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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 228

THE CHIPPEWA INDIANS OF MINNESOTA,
Appellants,

vs.

THE UNITED STATES AND THE RED LAKE BAND OF CHIPPEWA INDIANS OF MINNESOTA.

APPELLANTS' BRIEF.

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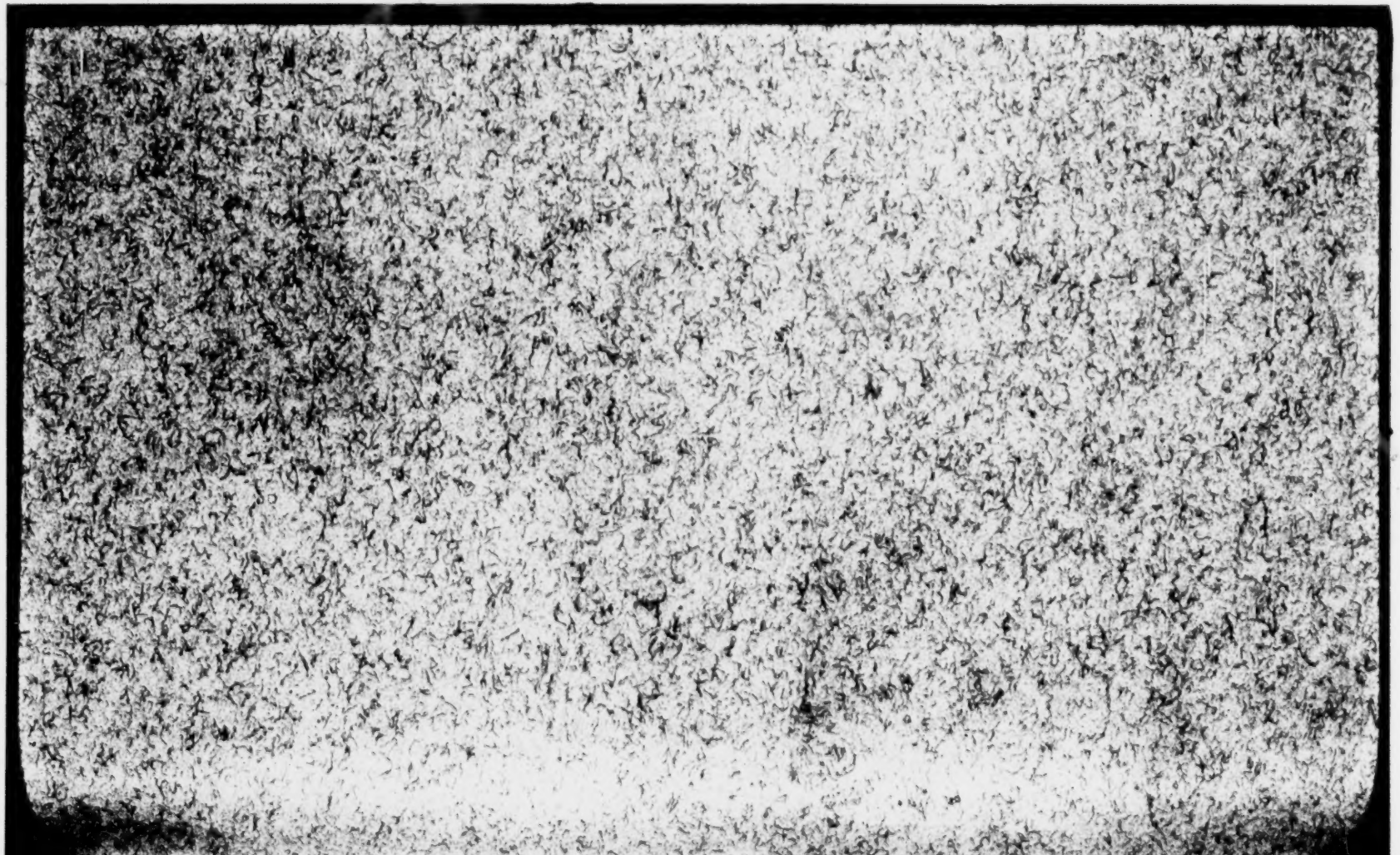

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 288

THE CHIPPEWA INDIANS OF MINNESOTA,
Appellants,

vs.

THE UNITED STATES AND THE RED LAKE BAND OF CHIPPEWA INDIANS OF MINNESOTA.
(*Intervenors*).

APPELLANTS' BRIEF.

OPINION BELOW.

The opinion of the Court of Claims is reported in 80 Ct. Cls., 410, and appears in the record at page 87.

PARTIES HERE AND BELOW.

Appellants here were Plaintiffs, and Appellees were Defendants and Intervenors in the Court below.

JURISDICTION.

The basis of the jurisdiction of this Court is set forth in appellants' Jurisdictional Statement filed and previously printed in compliance with Rule 12 of this Court.

STATEMENT OF THE CASE.

Jurisdiction of the Court Below.

This suit was brought under the special Jurisdictional Act approved May 14, 1926 (44 Stat., 555), as amended by the Act of June 18, 1934 (48 Stat., 979), the material portions of said Act, as amended, being as follows:

> "SEC. 1. That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party as in other cases, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent Act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. In any such suit or suits the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund provided for by section 7 of the Act of January 14, 1889 (25 Stat. L. 642), and the agreements entered into thereunder."
>
> • • • • • • •
>
> "SEC. 4. If it be determined by the Court that the United States, in violation of the terms and provisions of any law, treaty, or agreement as provided in section 1 hereof, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest at 5 per centum per annum from the date thereof; • • •."
>
> • • • • • • •

"SEC. 10. The proceeds of all amounts, if any, recovered for said Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the rate of 5 per centum per annum from the state of the judgment or decree • • •."

The Claim Asserted.

Under the above authority, plaintiffs brought suit in the Court of Claims against defendant, United States (R. 1-22), for the value of 663,421 acres of land, and timber thereon, which they alleged were ceded to defendant under an express trust, and later disposed of by defendant in disregard of the terms of the trust, for a wholly different purpose, and without any consideration therefor.

Defendant's Traverse.

To plaintiffs' petition defendant filed a General Traverse (R. 23).

Authority For, and Intervention By, the Red Lake Band of Chippewa Indians of Minnesota.

By the Act of May 18, 1928 (45 Stat. 601; R. 38), it was provided:

"That in case numbered H-76 heretofore filed in the Court of Claims under and in pursuance of an Act of Congress entitled 'An Act authorizing the Chippewa Indians of Minnesota to submit claims to the Court of Claims,' approved May 14, 1926 (Forty-fourth Statutes at Large, page 555), wherein the Chippewa Indians of Minnesota are parties plaintiff and the United States is party defendant, if the Court of Claims shall determine that the said Chippewa Indians are entitled to recover a judgment against the United States upon the cause of action therein set forth, the said court

shall further determine whether such judgment, or any part thereof, shall be paid by the United States out of funds held by the United States in trust for the Red Lake Band of Chippewa Indians of Minnesota, and if the court shall so determine and said funds are found inadequate, then the unsatisfied portion of said judgment shall be paid by the United States, but in no event shall any part of the land of the Red Lake Reservation be used in any way in payment thereof; and the said Red Lake Band of Chippewa Indians is hereby authorized on the approval of this Act, to appear in said suit by their attorneys employed in accordance with the provisions of existing law, and defend their rights in the matter."

Thereafter the Red Lake Band of Chippewa Indians of Minnesota moved the Court for leave to intervene in the pending suit, to which motion plaintiffs objected on the ground, among others, that the motion was premature, and after argument the Court overruled the objection and allowed the motion. Thereupon said Red Lake Band of Chippewa Indians filed their petition in intervention (R. 23).

Special Findings of Fact.

Thereafter the case came on for hearing and the Court made and filed Special Findings of Fact (R. 36), conclusion of law (R. 87), and its opinion (R. 87). Motion for new trial and amended findings was filed, and the Court thereafter filed an order and memorandum allowing certain requested amendments to the Special Findings of Fact, and with those exceptions, overruled the motion for new trial (R. 34-5).

(a) *The Basic Facts Found By The Court Or Shown By Public Records, Upon Which Appellants Rely.*

Appellants, the Chippewa Indians of Minnesota, constitute the class designated and described in the Act of Jan-

uary 14, 1889 (25 Stat. 642), and the agreements entered into pursuant thereto, as "all the Chippewa Indians of Minnesota" (F. 2, R. 37), and under the express language of the Jurisdictional Act, include and represent all those Indians entitled to share in the final distribution of the permanent fund provided for by Section 7 of the Act of January 14, 1889, and the agreements entered into thereunder (Act of June 18, 1934, 48 Stat. 979, *supra*, p. 2—).

The Antecedent History.

The Chippewa (or Ojibway), was one of the largest tribes of Indians north of Mexico. In the beginning of the eighteenth century, the Chippewa Nation, after driving the Foxes from northern Wisconsin, turned against the Sioux and drove them across the Mississippi River and south to the Minnesota River, and continued their westward march across Minnesota and North Dakota. After this conquest the Chippewas had a large number of villages, bands and local divisions scattered over a region extending a thousand miles east and west. Some of the bands bore the name of the village, lake or river near which they had taken up their residence. One of these was a band living about Red Lake, the issue of whose then living members intervened in this suit as the Red Lake Band of Chippewa Indians of Minnesota (F. 3, R. 37-8).

Beginning in 1785 and continuing thereafter, numerous treaties were made with the Chippewa Nation, or with major, or minor subdivisions thereof. Commencing in 1836 and continuing thereafter, the United States made treaties with separate bands, or groups of bands, for cessions of the tribal lands, and setting aside specified portions of the tribal lands for the use of the band or bands made parties thereto, wholly ignoring the tribe as a whole (F. 3, R. 37). As a result of this policy, on and long prior to the Act of January

14, 1889, the Chippewas in Minnesota resided on twelve reservations, the total area of which was approximately 4,747,931 acres (F. 4, R. 38). Of the twelve reservations, *eleven had been expressly described and set apart under the express language of prior treaties or Executive Orders for the exclusive use of the separate band or bands occupying and belonging to the same* (F. 5, R. 39), numbering 7,136 members (F. 13, R. 64).

The *twelfth* "reservation" was not in fact a reservation in the usual sense. It comprised an area of 3,200,000 acres, lying and situate around upper and lower Red Lake in northern Minnesota, *and had never been described, prior to January 14, 1889, in any single treaty or Executive Order.* It was officially known as the Red Lake Reservation, and was occupied and used exclusively by the Red Lake and Pembina Bands of Chippewas (F. 6, R. 39), numbering 1,168 Indians (F. 13, R. 64). It formed a part of the country taken from the Sioux by the Chippewa Nation as a whole (F. 3, R. 37), and *no provision of any treaty, Act of Congress, or Executive Order had ever conferred exclusive right thereto in the Red Lake and Pembina Bands.*

The Indian Appropriation Act of May 15, 1886 (24 Stat. 29, 44), contained the following provision:

> "To enable the Secretary of the Interior to negotiate with the several tribes and bands of Chippewa Indians in the State of Minnesota for such modification of existing treaties with said Indians and such change of their reservation as may be deemed desirable by said Indians and the Secretary of the Interior, and as to what sum shall be a just and equitable liquidation of all claims which any of said tribes now have upon the Government."

Under the authority contained in said Act (F. 9, R. 51), the Secretary of the Interior caused to be negotiated two inchoate agreements with Indians occupying ten reserva-

tions in Minnesota, and forming integral parts of "The Chippewas of the Mississippi" as recognized in the treaty of 1854. No agreements were negotiated with the Fond du Lac and Grand Portage Bands occupying two reservations in Minnesota, and forming a part of "The Chippewas of Lake Superior." The first of said inchoate agreements was with the Indians occupying nine reservations (R. 52), said Indians having 5,637 members, and the lands dealt with, aggregating 1,379,633 acres (R. 52), were treated as the common property of said 5,637 Indians. The second inchoate agreement was with the Red Lake and Pembina Bands numbering 1,103 and undertook to deal with the approximately 3,200,000 acres of land within the so-called Red Lake Reservation as the exclusive property of said two bands (R. 52).

The two inchoate agreements were transmitted to Congress for ratification. They were considered by the Committee on Indian Affairs of the House of Representatives, who reported to the House, recommending their disapproval largely because the Secretary had dealt with the approximately 3,200,000 acres on the so-called Red Lake Reservation as the exclusive property of the 1,103 members of the Red Lake and Pembina Bands occupying said reservation, and in substitution therefore, the House Committee introduced, and recommended the passage of, the bill known as H. R. 7935. In its report accompanying said bill, the Committee set out its reasons for rejecting said inchoate agreements and the objects and purposes intended to be accomplished by the bill (R. 52). The reasons for rejecting the inchoate agreements (R. 53-4), *inter alia*, were:

> That the Red Lake Reservation comprising 3,200,000 acres was occupied by only 1,100 Indians, while the other 6,000 Indians occupied 1,500,000 acres;
>
> That the agreements proposed to sell 2,400,000 acres of the Red Lake Reservation, give the entire pro-

ceeds to the 1,100 Indians occupying that reservation, and to set aside for the 1,100 Indians in perpetuity the remaining 800,000 acres of that reservation, while the other 6,000 Indians were to be limited to the proceeds to be received from the remaining 1,500,000 acres, less such land as was necessary to make allotments to them; which division the Committee considered unfair and unwise in every view, particularly as the so-called Red Lake Reservation was simply a remnant of unceded Indian territory and really the common property, so far as the Indian title was concerned, of all the Chippewa Indians in Minnesota;

That it was conceded on all hands that the only safe and practical way to civilize the Indians was to allot lands in severalty to them—breaking up their tribal relations and ownership in common and putting them to work on their several allotments;

That the agreement with reference to the Red Lake lands not only did violence to what was then conceded to be the proper policy to pursue, but was particularly calculated to build up an Indian land monopoly and oligarchy, more than that which then existed among the so-called civilized tribes in Indian territory.

The objects and purposes sought to be obtained by the bill (R. 55), *inter alia*, were:

To "break up their tribal relations and make them full citizens" by removing all the Indians from the small out-lying and scattered reservations to the White Earth Reservation and there allotting them land in severalty, except the members of the Red Lake Band, numbering 1,100 who were to be allotted land in severalty on the Red Lake Reservation.

The residue land, remaining after all allotments were made, to be surveyed and classified into pine and agricultural lands; the pine land, after proper appraisal, to be sold at public auction to the highest bidder,

but at not less than the appraised price, and the agricultural lands to be sold under the Homestead Laws, the proceeds to be received from all the surplus lands, less the necessary expenses attending the survey, appraisal and disposal, to be deposited in the Treasury of the United States in a permanent interest-bearing fund, the interest and principal of which were to inure to the benefit of all the Indians in common.

The bill was in the nature of a proposal to the Indians and if not accepted by them was inoperative and nugatory; if accepted and assented to by at least two-thirds of the male adults, it would become effective.

Attention is invited to said report in its entirety (R. 52-5).

(b) *The Act of January 14, 1889.*

The bill thus reported to Congress, with slight amendment, became the Act of January 14, 1889, and is set out in full in Finding 10 (R. 55). It is here summarized as follows:

By Section 1 the President was directed to appoint three Commissioners to proceed as soon as practicable

"to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota except the White Earth and Red Lake Reservations, and *to all and so much of these two reservations* as in the judgment of said commission *is not required to make and fill the allotments required by this and existing acts and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms* hereinafter stated: and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, *except as to the Red Lake Reservation*, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe

of Indians occupying and belonging to such reservations; *and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota;* and provided that all agreements therefore shall be approved by the President of the United States before taking effect • • •."

"And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, *and for the purpose* of making the *allotments* and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as aforesaid and before completing the same, *make an accurate census of each tribe or band,* classifying them into male and female adults, and male or female minors; and the minors into those who are orphans and those who are not orphans, giving the exact number of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and *shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.*" (Italics ours.)

Section 2 is procedural only, and not here material.

Section 3, (R. 57), provides that upon the completion of the census and when the cessions and relinquishments have been obtained, approved and ratified as provided in Section 1, all of the Chippewa Indians in Minnesota except those at Red Lake should be removed to the White Earth Reservation. Then follows this provision:

"Thereupon there shall, *as soon as practicable,* under the direction of said commissioners, *be allotted*

lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, *in conformity with the Act of February eighth, eighteen hundred and eighty-seven,* * * *."*

Sections 4, 5, and 6 (R. 58-60), deal with the sale of all ceded lands, and the timber thereon, by the United States. Section 4 provides for the survey and examination of the ceded lands by forty-acre lots, the classification of the lands into pine lands and agricultural lands and the estimating of the quantity of pine timber thereon, together with the valuation of such timber at not less than $3.00 per thousand feet, board measure. Section 5 provides for the sale of the pine lands to the highest bidder for cash at not less than the appraised value of the timber thereon. Section 6 provides for the disposal of the agricultural lands under the provision of the Homestead Law at the rate of $1.25 per acre.

Section 7 (R. 61):

"That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota *as a permanent fund,* which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal

shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; *and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares:* Provided, That Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof." (Italics ours.)

The Act of February 8, 1887 (24 Stat. 388), in conformity with which allotments were to be made, definitely fixed the quantity of agricultural land to be allotted each Indian and made provision for arbitrary allottments to Indians who failed to select land (F. 12, R. 63), as follows:

"To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section;

To each other single person under eighteen years of age * * *, one-sixteenth of a section. * * *."

"when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands in quantities as above provided shall be made to each individual."

"SEC. 2. * * * That if any one entitled to an allotment shall fail to make a selection within four years

> after the President shall direct that allotments be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner."

After the appointment of the Commissioners under the Act of January 14, 1889 (F. 13, R. 63), the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, instructed said Commissioners that the boundaries of the tract reserved at Red Lake "must be definitely determined and accurately described."

The Commissioners met with the various bands of Chippewa Indians in Minnesota; held numerous council meetings with them on their various reservations and prepared census reports as required by the Act (F. 13, R. 64).

(c) *The Agreements.*

The Commissioners negotiated ten agreements with the several bands or tribes of Chippewa Indians in Minnesota. Each of said agreements was executed in writing by the Commissioners on behalf of the United States, and by the Indian signatories thereto on behalf of their several bands or tribes (F. 15, R. 65).

The first agreement of cession was with the Indians occupying and belonging to the Red Lake Reservation (Fs. 14 and 16, R. 64, 66), and is as follows:

> "We, the undersigned, being male adult Indians over eighteen years of age, of the tribes or band of Chippewa Indians occupying and belonging to the Red Lake Reservation, in the State of Minnesota, *do hereby certify and declare that we have heard read, interpreted, and thoroughly explained to our understand-*

ing, the act of Congress approved January 14, 1889, entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota' (Public, No. 13), *which said Act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof,* and do hereby grant, cede, relinquish, and convey to the United States all our right, title and interest in and to all and so much of said Red Lake Reservation as is not embraced in the following described boundaries, to wit:''

(Here follows a description of 661,118 acres, F. 20, R. 69.)

''*for the purposes and upon the terms stated in said act, which said lands embraced within the foregoing boundaries have been reserved* by the commissioners appointed under said act and as therein authorized *for the purpose of making and filling the allotments therein provided for.*'' (Italics ours.)

The Pembina Band of Indians had joined with the Red Lakes in the treaties of October 2, 1863 and April 12, 1864 (F. 7, R. 39), but in 1889, 218 members of said band were residing on the White Earth Reservation, and the Commissioners, evidently believing it was desirable to include them in the agreement with the Indians occupying and belonging to the Red Lake Reservation, requested them to, and they did, execute (F. 16, R. 67), a separate paper in the form of an agreement of cession which was identical in all respects with the agreement executed by the Indians occupying and belonging to the Red Lake Reservation, except as to date, band, individual signers and residence.

Thereafter the Commissioners negotiated eight additional agreements with the bands or tribes occupying or belonging to the remaining eleven reservations (Fs. 17, 18,

R. 67). The agreement with the Indians occupying and belonging to the White Earth Reservation embodied in its entirety the Act of January 14, 1889 (Ex. Doc. 247, 51st Cong., 1st Sess., pp. 35-8), and the remaining seven agreements embodied said Act by reference, as in the agreements with the Red Lake and Pembina Bands. None of these eight agreements contained any description of the land reserved at Red Lake, but each contained identical provisions (Fs. 16, 17, R, 66, 67; H. R. Ex. Doc. 247, 51st Cong., 1st Sess., pp. 38, 43, 46, 50, 57, 60, 61, 64), as follows:

> "and we do also hereby cede and relinquish to the United States all our right, title, and interest *in and to all and so much of the Red Lake Reservation as is not required and reserved under the provisions of said act, to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided.*" (Italics ours.)

(NOTE.—The Court in its Finding 18, p. 68, last line, omitted, following the word "Indians" and before the words "as therein provided," the words "in quantity and manner," as will appear from an examination of the Congressional document above cited, of which this Court is requested to take judicial notice.)

The total number of male adults of all the Chippewa Indians in Minnesota was 2,178. The signers of the Red Lake and Pembina agreements numbered 324. The male adults of the other bands signing the eight agreements last described, total 1,560 (F. 19, R. 68). As the Court of Claims said in its "Memorandum on Motion for a New Trial" (R. 35):

> "Without including any of the Red Lake or Pembina Bands, more than two-thirds of all of the Chippewa Indians of Minnesota consented to the provisions of the agreements made with reference to the Red Lake Reservation."

On December 26, 1889, the Commission, having completed the census and secured the agreements of cession, transmitted the same, together with a written report of their work, to the Secretary of the Interior (F. 20, R. 68). In their report the Commission directed special attention to the cession of lands on the Red Lake Reservation and the excessive withdrawal (F. 20, R. 69) as follows:

> "The Red Lake Reservation, *which they cede to the United States, contains 3,260,000 acres.* The number of Indians occupying the same is 1,168.
>
> "The boundaries of the diminished reservation, from which allotments to the Red Lake Chippewas are to be made, are as follows:
>
> (Then follows a description of the Red Lake diminished reservation, which description departs in language and somewhat in essence from the description appearing in the Red Lake agreement. See Finding 16.)
>
> "*This is larger than they will eventually require, but as there are swamps and other untillable lands therein, it cannot be reduced until after survey and allotment shall be made.*" (Italics ours.)

The total area of the diminished Red Lake Reservation as described in the aforesaid agreements with the Red Lake and Pembina Bands was 661,118 acres (F. 20, R. 69).

On January 30, 1890, the Secretary of the Interior transmitted the report of said Commissioners and the accompanying papers, together with his report thereon, to the President. In his report he advised the President (F. 21, R. 69), in part, as follows:

> "• • • The Red Lake Reservation, two-thirds of which at least is ceded to the United States, contains 3,260,000 acres, and the number of Indians occupying it is 1,168. The boundaries of the diminished reserva-

tion, from which allotments to the Red Lake Chippewas are to be made, are given in the report. The commissioners report that—

"'This reservation is larger than will eventually be required, but as there are swamps and other untillable lands therein, it cannot be reduced until after survey and allotments shall be made.'

"*Whether the surplus lands that may remain after allotments shall have been completed as required by the law can be disposed of without further legislation is a question which will require consideration, but such consideration is not necessary at this time.*" (Italics ours.)

On March 4, 1890, the President endorsed his approval on each of said agreements and on the same day transmitted the same, accompanied by all the papers, by message in writing to Congress (F. 22, R. 70), in part, as follows:

"Being satisfied from an examination of the papers submitted that the cession and relinquishment by said Chippewa Indians of their title and interest in the lands specified and described in the agreement with the different bands or tribes of Chippewa Indians in the State of Minnesota was obtained in the manner prescribed in the first section of said act, and that more than the requisite number have signed said agreement, I have, as provided by said act, approved the said instruments in writing constituting the agreement entered into by the commissioners with said Indians."

On June 20, 1900, the Secretary of the Interior directed that the work of the Chippewa Commission be suspended and its accounts closed (F. 23, R. 72).

(d) *The Addition To The Reserved Lands By Executive Order.*

On the recommendation of Henry M. Rice, former chairman of the Chippewa Commission, who negotiated the

agreement with the Red Lake Indians, the President, by executive order dated November 21, 1892, withdrew 2,303 acres of the ceded lands and added them to the withdrawal on the Red Lake Reservation (F. 24, R. 72-3), the authority for which nowhere appears.

(e) *The Taking of the 663,421 Acres In The Withdrawal at Red Lake By Defendant.*

In 1902, no allotments had been made the Indians on the Red Lake Reservation and none were in prospect (F. 25, R. 73). In January of that year the City Council of Thief River Falls, Minnesota, addressed a letter to the Secretary of the Interior requesting "for certain reasons stated in the letter" that negotiations be entered into with the Indians living on the diminished Red Lake Reservation for the cession of certain of their lands to be subject to entry under the Homestead Laws of the United States, and that the proceeds received from said lands should be paid to the Red Lake Indians. This communication was transmitted to the Secretary by a statement in writing signed by the Senators and certain of the then Representatives of the State of Minnesota approving the same (F. 27, R. 74-5).

The Indian Appropriation Act, approved March 3, 1901 (31 Stat. 1058, 1077), contained (F. 27, R. 75), the following provision:

> "That the Secretary of the Interior be, and is hereby authorized, in his discretion, to negotiate, through any United States Indian inspector, agreements with any Indians for the cession to the United States of portions of their respective reservations or surplus unallotted lands, any agreements thus negotiated to be subject to subsequent ratification by Congress."

The Secretary of the Interior, relying on the authority contained in said Act (R. 75), on February 10, 1902, desig-

nated United States Indian Inspector James McLaughlin to negotiate with the Red Lake and Pembina Bands of Chippewa Indians for the cession of the western portion of the Red Lake Reservation as it then existed. Instructions, approved by the Secretary of the Interior, dated February 12, 1902, were transmitted to Inspector McLaughlin for his guidance in conducting said negotiations. Resulting from said negotiations, an inchoate agreement, dated March 10, 1902, was entered into by the Indian Inspector, on the part of the United States and by 220 male adult Indians on the part of the Red Lake and Pembina Bands of Chippewa Indians belonging on said reservation. The said inchoate agreement was transmitted by the Secretary of the Interior to Congress by letter dated April 3, 1902, but was never ratified (F. 28, R. 76).

Thereafter there was included in the Indian Appropriation Act approved March 3, 1903, a provision (F. 28, R. 76), which, among other things, authorized the Secretary of the Interior to sell all that part of the reserved lands on the Red Lake Reservation lying westwardly of the range line between ranges 38 and 39 west of the 5th principal meridian, comprising 256,152 acres (F. 28, R. 76), the proceeds thereof to be paid into the United States Treasury to the credit of the Indians belonging on said reservation, with a proviso that said provision should not become effective unless assented to by a majority of the male adults of the Red Lake and Pembina Bands residing on said reservation (F. 28, R. 76).

The Indians declined to accept said provision, and thereafter Congress, by the Act approved February 20, 1904 (F. 29, R. 76-82), directed the sale of said 256,152 acres and the payment of the proceeds received therefrom in annual per capita payments to the Indians belonging on said Red Lake Reservation. Said Act further provided that the In-

dians belonging on said Red Lake Reservation *should possess their diminished reservation independently of all other bands of the Chippewa tribe of Indians and that nothing contained in said Act should be so constructed as to deprive the Indians on the Red Lake Reservation of any benefits to which they were entitled under existing treaties or agreements not inconsistent with the provisions of said Act.*

(f) *Acreage Taken and Value.*

Defendant has held and continues to hold said reservations and the moneys derived therefrom, for the sole and exclusive benefit of the Indians belonging on said Red Lake Reservation, to the exclusion of all other Chippewa Indians of Minnesota (F. 30, R. 82). No allotments have ever been made on said reservation (F. 25, R. 73). The net proceeds received from the sale of said 256,152 acres, and amounting to $1,268,156.84, were deposited in the Treasury of the United States solely to the credit of the Chippewa Indians belonging on the Red Lake Reservation, and represented the fair market value of said lands as of February 20, 1904 (F. 31, R. 82). On the effective date of said Act of February 20, 1904, the reasonable value of the Norway and White pine timber standing on the remaining part of said reservation was $1,413,005.00, and the reasonable market value of the remaining lands was $542,128.00 (F. 32, R. 82-3), giving a total value for the entire reservation as it stood at the date of said Act of $3,223,289.84.

(g) *Indians on Red Lake Reservation.*

The number of Indians occupying and belonging on the Red Lake Reservation as shown by the census taken under the said Act of January 14, 1889, was 1,168 (F. 33, R. 83), composed of (H. R. Ex. Doc. No. 247, 51st Cong., 1st Sess.,

p. 9), the following classes: male adults 303; female adults 359, male minors 237; female minors 247; male orphans 15; and female orphans 7. Allotments to said Indians under the Act of February 8, 1887 (24 Stat. 388; F. 12, R. 63), would have required 73,980 acres of agricultural land, upon the basis of 80 acres each to the male and female adults and male and female orphans, numbering 684, and 40 acres each to the male and female minors, numbering 484, leaving a surplus of 589,441 acres.

The number of Indians belonging on the Red Lake Reservation within the meaning of the Act of February 20, 1904, on the date of the approval of said Act, was 1,418 (F. 33, R. 83), but the number of adults, minors and orphans comprising said total membership is not shown. Their number has steadily increased from 1889 until on February 26, 1927 when they numbered 1,736 (F. 33, R. 83).

(h) *Judgment of the Court, and Appeal Therefrom.*

On the facts as specially found by the court below, it concluded as matter of law, that plaintiffs were not entitled to recover and that their petition should be dismissed (R. 87), its reasons therefor being set out in a written opinion (R. 87-113). Thereafter plaintiffs moved the court for amended Findings of Fact and new trial. The court rejected all requested amendments except one and denied new trial (R. 35). On April 8, 1935, judgment was entered dismissing plaintiffs' petition (R. 113). On May 6, 1935, petition was filed in this Court (Case No. 42) for a Writ of Certiorari to review the judgment entered in the Court of Claims and on October 14, 1935, denied (296 U. S.). Thereafter and on June 22, 1936, the President approved Public Resolution No. 121, 74th Congress (R. 114-15), under which this appeal was prosecuted (R. 115), to this Court.

ASSIGNMENT OF ERRORS.

Appellants assign as error that the court erred in each of the following respects (R. 115-17):

I.

In holding that the Indian title to the lands in the so-called Red Lake Reservation, at and prior to the agreements of cession made under the Act of January 14, 1889, was material to any issue in this case; and including, in its Special Findings of Fact, Findings numbered 3, 7, and 8, relating to the history of such prior title.

II.

In holding that such prior title was exclusively in the Red Lake Indians.

III.

In holding that the extent of the cession of lands on the so-called Red Lake Reservation was governed exclusively by the terms of the agreement with the Red Lake Indians, and in concluding therefrom that all lands included within the area described in said agreement as reserved, remained the exclusive property of the Red Lake Indians.

IV.

In disregarding the cession of said Red Lake Reservation effected by agreements executed by more than two-thirds of the male adults of all the Chippewa Indians of Minnesota, whereby there was expressly ceded all and so much of the Red Lake Reservation as was not actually required to make and fill the allotments to the Red Lake Indians, in quantity and character as provided in the Act of January 14, 1889.

V.

In holding neither the Act of January 14, 1889 (25 Stat. 642) nor the General Allotment Act of February 8, 1887,

were made a part of the agreements with the Indians, and that no allotments to the Indians on the Red Lake Reservation were required to be made under said agreements.

VI.

In holding, in effect, that plaintiffs had no right, title nor interest in the lands, and timber thereon, disposed of by the Act of February 20, 1904 (33 Stat. 48-50), and hence sustained no loss thereby.

VII.

In including in its Special Findings of Fact, finding number 34, relating to dispositions by defendant of portions of the Red Lake Reservation subsequent to January 14, 1889.

VIII.

In including in its Special Findings of Fact, findings numbered 37, 38, 39, 40, and 41, relating to claimed offsets by defendant.

IX.

In holding as a conclusion of law that plaintiffs were not entitled to recover and directing that plaintiffs' petition be dismissed.

X.

In entering judgment dismissing plaintiffs' petition.

QUESTIONS FOR DECISION.

Two primary questions are here presented for decision:

Did the agreements, approved March 4, 1890, effect a cession of all lands on the Red Lake Reservation, except enough lands to make allotments in the quantity and of the character defined in the Act of January 14, 1889 (24 Stat. 642), to the Indians residing thereon?

If so, did the Act of February 20, 1904 (33 Stat. 46-50; R. 76-82), effect such an appropriation or disposal within the meaning of Section 4 of the Act of May 14, 1926 (44 Stat. 555; R. 2-3), of the ceded lands as entitles appellants to recover their value?

SUMMARY OF ARGUMENT.

This suit is for the recovery of the value, as of February 20, 1904, of so much of 663,421 acres of land, and timber thereon, as would not have been required to make allotments of land at the time, in the quantity, and of the character directed in the Act of January 14, 1889, to the members of the Red Lake and Pembina bands of Chippewa Indians occupying or belonging on the land. The allotments were directed to be made "as soon as practicable" after March 4, 1890. On that date the number of Red Lake and Pembina Indians entitled to allotments out of the land, was 1,168, and the total acreage required to make allotments of land chiefly valuable for agricultural purposes to each of them was 73,980.

The lands in suit are within an area described in the Act of January 14, 1889 as the "Red Lake Reservation". The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their original right of occupancy to the surrounding lands. There was no formal setting apart of the land in suit, nor any affirmative declaration in any treaty, law of Congress, or executive order of the rights of any particular band of Chippewa Indians therein. It was merely a remnant of unceded Indian lands occupied in 1889 by members of the Red Lake and Pembina Bands of the Chippewa Indians, and so far as the Indian title is concerned, was the property of the Chippewa Indians (Assignment of Error II, *supra*, p. 22; Argument, *infra*, pp. 34-39).

Appellants' title is grounded upon the Act of January 14, 1889, and agreements made with all the eleven bands of Chippewa Indians in Minnesota and approved by the President on March 4, 1890, all in strict conformity with the authorization and directions contained in the Act. By the Act and the agreements, all land and timber thereon embraced in the Red Lake Reservation, except enough land to make allotments at the time, in the quantity, and of the character described in the Act to the members of the Red Lake and Pembina Bands residing or belonging thereon, were ceded to the United States under an express trust. The Act is set out in full in the Record (pp. 55-62), and is summarized in appellants' Statement of Fact (*supra*, pp. 9-13), to which references are here made to avoid repetition. The agreement made with the Red Lake Band appears textually in the findings of the court below (F. 16, R. 66-7); the agreements with the remaining ten bands are summarized in the findings of the court below (Fs. 16, 17, 18, R. 66-7), and in appellants' Statement of Fact (*supra*, pp. 13-17), and the Act and agreements considered in appellants' Argument (*infra*, pp. 39-60), to which references are here made.

The court below apparently concedes that if appellants are correct in their contention with reference to the extent of the cession, they are entitled to recover, but held that there was no cession effected by the Act and agreements of any of the land in suit.

The express provision appearing in section 1 of the Act authorizing "two-thirds of the male adults of all the Chippewa Indians in Minnesota" to make the cession, followed by cession agreements in writing signed by more than two-thirds of the male adults of all the Chippewa Indians in Minnesota, ceding all the land not required "to make and fill the allotments to the Red Lake Indians in quantity and manner" as in the Act provided, and the approval by the

President of the cession agreements, which approval the Act declared (Sec. 1), should "operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever" render (1), immaterial to a determination of appellants' rights a consideration of the Indian title at and prior to January 14, 1889 (Assignment of Error II, *supra*, p. 22; Argument, *infra*, pp. 34-9, and (2), foreclosed consideration of that question by the Courts (Assignment of Error I, *supra*, p.22; Argument, *infra*, pp. 29-33).

The validity of the cession of the lands in suit was in nowise dependent upon the consent of two-thirds of the adult male members of the Red Lake and Pembina Bands, nor upon the consent of two-thirds of the adult male members of each of the eleven bands, in view of the express provision contained in the Act authorizing "two-thirds of the male adults of all the Chippewa Indians in Minnesota" to make the cession, followed by the cession made by the requisite two-thirds, and the approval thereof by the President (Assignment of Error III, *supra*, p. 22; Argument, *infra*, pp. 39-59).

The cession of all land in suit, except enough to make allotments at the time, in the quantity, and of the character, described in the Act, to members of the Red Lake and Pembina Bands residing or belonging thereon, by more than "two-thirds of the male adults of all the Chippewa Indians in Minnesota" to defendant, United States, and the approval of the agreements of cession by the President, effected a valid cession of the surplus lands to the United States impressed with the express trust defined in the Act and under which appellants were the sole beneficiaries (Assignment of Error IV, *supra*, p. 22; Argument, *infra*, pp. 39-59).

The Act was, in express terms, embodied in and made a part of each of the ten agreements, and was expressly ac-

cepted and ratified by the Indians as recited in each agreement. The Act (Sec. 3), directed allotments of land at the time, in the quantity, and of the character therein expressly defined to the members of the Red Lake and Pembina Bands; the United States, as Trustee, expressly agreed to make the allotments, and the Red Lake and Pembina Bands expressly agreed to accept their allotments, in conformity with the provisions of the Act. Neither the failure of the United States, as Trustee, to make the allotments, nor the failure of the Red Lake Indians, in breach of their promise to take their allotments, could operate to defeat appellants' rights in and to the surplus lands (Assignment of Error V, *supra*, p. 22; Argument, *infra*, pp. 39-59).

The withdrawal of 2,303 acres of the lands theretofore admittedly ceded, by the Act of January 14, 1889 and the agreements entered into and approved thereunder, to defendant, United States, under the express trust, for the exclusive benefit of appellants, and the inclusion of the withdrawn lands in the lands in suit, was without authority of law, and clearly constituted a taking of this land within the meaning of Section 4 of the Jurisdictional Act of May 14, 1926, as amended, for which plaintiffs are entitled to recover (*infra*, pp. 59-60).

In disregard of the mandate contained in the Act of January 14, 1889 and the agreements entered into and approved thereunder, no allotments had been made to the members of the Red Lake and Pembina Bands, and there had been no segregation of the surplus lands in suit. By the Act of February 20, 1904, defendant, United States, took the surplus lands in suit and conferred title thereto upon the members of the Red Lake and Pembina Bands, to the exclusion of all the other Chippewa Indians in Minnesota, in disregard of its trust obligations, and resulting in complete loss to appellants. This constituted a taking of the land within the meaning of Section 4 of the Jurisdictional Act of

May 14, 1926, as amended, and authorizes recovery of the fair value of the lands and timber taken. The court below apparently concedes that if the lands in suit were ceded by the Act of January 14, 1889 and the agreements entered into thereunder, appellants are entitled to recover the value thereof (Assignment of Error VI, *supra*, p. 23; Argument, *infra*, pp. 39-70).

The inclusion in the Special Findings of Fact by the court below of Finding 34 was improper, as the language appearing in the Act of February 20, 1904, is clear and unambiguous, and there was no occasion to make resort to antecedent records. If, however, resort to antecedent records was permissible, then the entire record should have been considered, and not merely such portions thereof as tended to support the conclusion of the Court (Assignment of Error VII, *supra*, p. 23; Argument, *infra*, pp. 60-5).

The inclusion in the Special Findings of Fact by the court below of Findings numbered 37, 38, 39, 40 and 41, relating to claimed offsets by defendant, was improper in view of the statement of the court below, appearing in its memorandum opinion on appellants' petition for re-hearing, that it "did not decide that any item or items of expenditures made by the Government was proper offsets under the bill which gave this Court jurisdiction of the case" (Assignment of Error VIII, *supra*, p. 23; Argument, *infra*, pp. 70-3).

The conclusion of the court below that appellants were not entitled to recover, directing that plaintiffs' petition be dismissed, that judgment be entered accordingly, and the entry of the judgment, were error (Assignment of Errors IX and X, *supra*, p. 23; Argument, *infra*, pp. 39-73).

ARGUMENT.

We will now consider the errors assigned, and in aid of clarity, we will first consider separately assignments I and

II, which run to fundamental errors upon which the opinion of the Court below is pivoted.

Assignment of Error I

> "That the Court erred in holding that the Indian title to the lands in the so-called Red Lake Reservation, at and prior to the agreements of cession made under the Act of January 14, 1889, was material to any issue in this case; and including, in its Special Findings of Fact, findings numbered 3, 7 and 8, relating to the history of such prior title."

The conclusion of the lower Court that appellants' petition should be dismissed (R. 113), is pivoted upon the Indian title to the Red Lake Reservation at and long prior to the Act of January 14, 1889, which it finds was exclusively in the Red Lake Band (R. 88-93, 98-9). Counsel for appellants insist that the prior title was not open to consideration by the trial Court, and hence could form no basis for a determination of the claim asserted.

The Jurisdictional Act of May 14, 1926 (44 Stat. 555) (R. 1, 36, Sec. 1), conferred jurisdiction on the Court of Claims to hear, determine, and render judgment "in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889. • • • which said Chippewa Indians of Minnesota may have against the United States." Section 4 (R. 2-3), directed the lower Court, if it found "that the United States, in violation of any law • • • or agreement as provided in Section 1 hereof, has unlawfully appropriated or disposed of any money or other property belonging to the Indians," to enter judgment for the value thereof at the time of the appropriation or disposal.

Thus the Act of January 14, 1889, is definitely made the starting point, and the basis of all claimed rights. Section 1 of that Act (R. 56-7), declared that the cession of the

Red Lake Reservation should be sufficient if made by "two-thirds of the male adults of all the Chippewa Indians in Minnesota," and conferred upon the President the exclusive authority to determine whether the requisite two-thirds had, in fact, executed the agreements of cession, thus impliedly, if not expressly, recognizing the common ownership of this unceded Indian land in all the Chippewas, and expressly conferring exclusive authority upon "two-thirds of all the male Chippewa Indians in Minnesota" to make the cession of the Red Lake Reservation.

That this provision for a valid and binding cession of the Red Lake Reservation by all the Chippewas of Minnesota constituted a recognition by Congress of their common ownership of this unceded area, is perhaps plain enough from the language of the Act. But if there be any doubt of this conclusion, we may look to the reports of the committees of Congress to aid in construction. *Duplex Co.* v. *Deering*, 254 U. S. 443. The report of the committee of the House reporting the bill which became the Act under consideration states (R. 53):

> "The so-called Red Lake Reservation is simply a remnant of unceded Indian Territory, occupied at present by the Red Lake band, but really the common property, so far as the Indian title is concerned, of all the Chippewa Indians in Minnesota."

There can be no serious doubt on this record of the intent of Congress by the Act in question to recognize and affirm this common title.

In view of this Congressional action and the subsequent approval of the agreements by the President, neither the power of two-thirds of the male adults of all the Chippewas to make the cession, nor the validity of the cession made by them was open to consideration by the trial Court,

United States v. *The State of Minnesota*, 270 U. S. 181, at 201-2.

Certainly, under the decision in that case, the express declaration by Congress of the right of two-thirds of the male adults of all the Chippewas to cede the Red Lake Reservation, and the subsequent approval by the President of the cession thus effected, effectually set at rest any question of the prior title which is no longer "the subject of judicial inquiry."

The rule of *United States* v. *The State of Minnesota*, recognizing the conclusive effect of the acts of the legislative and executive branches in accepting such cessions, is particularly applicable here, where Congress was admittedly dealing merely with the aboriginal Indian title or right of occupancy which, until the same was ceded under an explicit trust by the agreements in question, was, of course, wholly subject to the plenary power of Congress over tribal Indian property.

In addition, the Red Lake and Pembina bands as well as all the other Indians, by the very agreements here in question, expressly "consented and agreed to said Act and accepted and ratified the same and all of the provisions thereof". By so doing they thus accepted and ratified the provisions of that Act as to the manner in which the cession of the Red Lake Reservation was to be effected as fully as any other provision, and thereby effectually assented and agreed that the cession of the Red Lake Reservation be effected as provided in the Act, *i.e.*, "by two-thirds of all the male adult Chippewa Indians in Minnesota". This assent is not only evidenced by the express words of approval and ratification of the Act embraced in the Red Lake and Pembina agreements above quoted, but is confirmed and rendered unassailable by the estoppel arising from the fact that for more than forty years the Red Lake Indians have participated in the payments and

benefits of the trust for all the Chippewas created under and in strict accordance with the Act so assented to.

At the same time the bands of Chippewas other than those of Red Lake entered into their several agreements and relinquished their respective reservations to the common trust, in reliance upon the provisions of the Act which stated in plain terms their common right to cede to the United States (and thus place in trust for the common benefit of all) not only their own lands, but all of the Red Lake Reservation not actually required for allotments to the Red Lake Indians, and by the express terms of their eight separate agreements, executed by more than the required two-thirds of the male adults of all the Chippewas in Minnesota, these other bands did in fact cede to the common trust not only their own reservations, but also all of the Red Lake Reservation not required for allotment.

As a result, *no matter how exclusive may have been the title of the Red Lake Indians,* they, having expressly approved and assented to and accepted the benefits of an Act authorizing the disposition of the Red Lake lands by two-thirds of the male adults of all the Chippewas, are bound by the disposition so made. In consequence, *regardless of the state of the Indian title,* the extent of the cession at Red Lake is not to be determined from the terms and exceptions embraced in the Red Lake and Pembina agreements of cession (upon which the court below in fact solely relied), but from the terms of agreements of cession signed by two-thirds of the adult males of all the Chippewas. Thus, since more than two-thirds of the adult males signed agreements (made with the other bands) ceding all and so much of the Red Lake Reservation as was not required for allotments to the Red Lake Indians, the attempted exception of an area of land in excess of that required for allotments embraced in the Red Lake agreement, and any failure of the Red Lake Indians to join in any cession of such

excess lands becomes wholly immaterial, *regardless of their prior title.*

For the foregoing reasons it is submitted that *regardless of the state of the Indian title to the Red Lake Reservation prior to the Act of 1889,* the validity of the declaration by Congress as to the persons authorized to effect the cession, and the resulting cession, by the persons so authorized, of all and so much of that reservation as was not required to make the allotments, was not open to question by any party to this suit.

In consequence, the state of such former Indian title was wholly immaterial to any issue involved, and the inclusion of the findings relating thereto was error.

In this connection we desire to emphasize that the error of the court below in this regard lies at the very foundation of the decision below, and constitutes one of the fundamental errors which underlie the judgment appealed from. Finding, as it did, that the exclusive Indian title to the Red Lake Reservation prior to 1889 was in the Red Lake and Pembina bands, and overlooking the conclusive effect of the express provisions of the Act of 1889, and the express assent of the Red Lake and Pembina Indians to those provisions, the court below determined the case upon the theory that the extent of the cession at Red Lake was to be determined *solely by the terms of the Red Lake and Pembina agreements,* and concluded that the vast area described solely in those agreements as reserved for allotments, was not ceded at all. (See Opinion below, R. 93, 95, 98-9.) The Court gave no effect whatever to the cessions made by the other bands, who, by agreements signed by the necessary two-thirds of the male adults of all the Chippewas of Minnesota, ceded all of the Red Lake Reservation which was not both (1), required, and (2), reserved, for the allotments to the Red Lake Indians.

Assignment of Error II.

"The court erred in holding that such prior title was exclusively in the Red Lake Indians."

While the opinion of the Court nowhere expressly so states, it is apparent that the Court intended to hold that the 1,168 Indians occupying the vast area of 3,200,000 acres known as the Red Lake Reservation were vested with the exclusive Indian title thereto at and prior to the time of the passage of the Act of January 14, 1889.

As pointed out above, it is the contention of appellants that whatever may have been the actual state of this Indian title prior to the Act of 1889, Congress, by that Act, and particularly by that portion of Section 1 thereof which authorized the cession of the Red Lake Reservation by "two-thirds of the male adults of all the Chippewa Indians in Minnesota", recognized the Indian title thereto of all the Minnesota Chippewas and the consequent right of the Minnesota Chippewas as a whole to cede the same, even over the objection of the Red Lake Band alone, and that since Congress thus recognized the right of all the Chippewas of Minnesota, as distinct from the Red Lake Band, to effect a cession of this reservation, and a cession having been effected in strict accordance with the Congressional authority, the question of the authority and title of the parties making the cession cannot be inquired into by the Court, but is a political question finally and conclusively determined by Congress.

It is our further contention that the express assent by the Red Lake Indians to the provisions of the Act of 1889 (including the provisions as to the manner in which the Red Lake Reservation was to be ceded), and their subsequent acceptance of the benefits of the Act, necessarily subjected their title, whatever it may have been, to the pro-

visions of the Act, and constituted a conclusive assent to the cession of the Red Lake Reservation by "two-thirds of the male adults of all the Chippewas in Minnesota".

In consequence it is submitted that the actual state of the Indian title to the Red Lake Reservation prior to the Act of 1889 is not of controlling importance here.

The history of this Indian title is, however, helpful to an understanding of the motives which actuated Congress in singling out the Red Lake Reservation and providing for its cession "by two-thirds of the male adults of all the Chippewas in Minnesota", while each of the other reservations was to be ceded by a like proportion of the male adults of the Indians occupying the same.

The early history of this reservation is summarized in the Court's findings 3, 4, 5 and 6 (R. 37-9), whereby it appears that all of the Chippewa country in Minnesota was originally taken by the Chippewa Nation as a whole by conquest from the Sioux, the various bands of Chippewas being thereafter scattered through the vast area thus conquered and gradually becoming known by the names of lakes and rivers near which they resided.

The Government originally treated with the Chippewa Nation as a whole, as appears from Finding 3, but it soon commenced the practice of negotiating for cessions of lands from the individual bands located adjacent to the lands acquired. Thus there grew up an apparently unjustified theory of separate ownership in the various bands. As the Commission appointed under the Act of 1889 stated in its report to the Commissioner of Indian Affairs (F. 20, R. 68):

> "• • • The Chippewas of this State did unquestionably, in early times, hold their lands in common. It was so in 1825, at the time of the treaty at Prairie du Chien, and no other idea would ever have been entertained *had not the mistaken policy of purchasing a tract here and there from the bands contiguous thereto*

been adopted. Of the vast cessions heretofore made, there is little, and in many cases nothing, left to show any benefit derived by the Indians therefrom." (Italics ours.)

In the course of the various treaties with individual bands above referred to, reservations were frequently set aside specifically for the separate use of the band or bands making each respective treaty. As a result, when the Act of 1889 was passed, eleven of the twelve Chippewa reservations existing in Minnesota had been specifically designated for the exclusive use of the band occupying the same by the terms of the respective treaties which created said reservations. This was not true, however, of the tract of unceded land commonly known as the Red Lake Reservation which was occupied by only 1,168 Chippewa Indians known as the Red Lake and Pembina Bands, and embraced an area of 3,200,000 acres. This tract had never been expressly described in any single treaty or Executive Order (F. 6, R. 39), and was correctly described in the report of the Committee of the House of Representatives which reported the bill that became the Act of 1889 as follows:

> "The so-called 'Red Lake Reservation' is simply a remnant of unceded Indian Territory occupied at present by the Red Lake Band, but really the common property, so far as the Indian title is concerned, of all the Chippewa Indians in Minnesota."

Of this reservation this Court said in *Minnesota* v. *Hitchcock*, 185 U. S. 373 at 389:

> "The land remained on March 4, 1890, land the fee of which was in the United States but subject to the Chippewa Indians' right of occupancy. No patent had ever been executed by the United States to the Indians in severalty, or to the tribe at large. The mere calling of the tract a reservation instead of unceded Indian

lands did not change the title. It was simply a convenient way of designating the tract."

The origin of the reservation is more graphically described in *United States* v. *Holt State Bank*, 270 U. S. 49, 58 as follows:

> "The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. The last treaties preceding the admission of the state were concluded September 30, 1854, 10 Stat. 1109, and February 22, 1855, 10 Stat. 1165. There was no formal setting apart of what was not ceded; nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory, and thus it came to be known and recognized as a reservation. Minnesota v. Hitchcock, 185 U. S. 373, 389, 22 S. Ct. 650, 46 L. Ed. 954."

Thus as a result of the "mistaken policy of purchasing a tract here and there from the bands contiguous thereto," about 6,400 Chippewa Indians were confined upon eleven small reservations aggregating in all 1,500,000 acres of land while the Red Lake Band, numbering 1,168 were occupying the vast unceded area, embracing 3,200,000 acres, commonly known as the Red Lake Reservation.

It was in recognition of this unjust situation, occasioned by the "mistaken policy" above referred to, for which defendant was solely responsible, that Congress in the Act of 1889 made the different and separate provision with regard to the Red Lake Reservation, and specifically provided for its cession if assented to by the necessary proportion *of all the Chippewas in Minnesota as a whole*, thus render-

ing it possible for the Chippewas as a whole, even over the objection of the Red Lake Band, to cause so much of the reservation as should not be required for allotment, to be ceded to the United States in trust for the common benefit of all.

With this history of this reservation in mind, it becomes apparent that the court below attached excessive importance to the fact that the United States had under the treaties of October 2, 1863 and April 21, 1864, accepted cessions from the Red Lake Indians alone of certain lands contiguous to the Red Lake Reservation. These treaties were merely fair examples of the "mistaken policy" of treating with separate bands above referred to.

It is also apparent from the foregoing history of the reservation as well as from the H. R. Committee report quoted by the Court in its Finding of Fact 9 (R. 52-5), that Congress, by providing for a cession of the Red Lake Reservation by all of the Chippewa Indians of Minnesota, instead of by the Red Lake Band alone, did not intend to wrongfully deprive the Red Lake Indians of anything which they fairly owned, without their consent, but did intend to remedy, so far as possible, the unjust consequences which would have resulted from a recognition of exclusive title in the Red Lake Indians.

The ruling of the lower Court was based upon three interdepartmental communications (Op., R. 92), the first two, (F. 8, sub-pars. 5, 6, R. 50), from the Commissioner of Indian Affairs to the Secretary of the Interior and dated January 1886 and February 11, 1887, respectively, and the third (R. 92), from the Commissioner of Indian Affairs to the Commissioners appointed under the Act of January 14, 1889, dated May 24, 1889 (F. 8, sub-par. 8, R. 51). In all three of said communications it is stated, in substance, that the Red Lake and Pembina Bands were the *exclusive* own-

ers of the Red Lake Reservation, and in the last communication (R. 51, Op. R. 92), that none but the Red Lake and Pembina Bands had ever claimed an interest in said reservation, said bands having "always been recognized as the sole owners by right of original Indian occupancy, the lands having never been ceded to the United States". These three communications constitute at best mere legal conclusions drawn from facts not stated, wholly without supporting evidence, and untrue in fact, and the documents are incompetent to prove any fact other than that the communications were written, which is conceded (*Mohawk Condensed Milk Co.* v. *U. S.*, 70 Ct. Cls. 671, at 678).

The inclusion of said three communications in the record, as proof of any fact, other than that the three communications were written, and the reliance thereon by the lower Court, as proof of the facts and conclusions as to the title to the reservation therein stated, was obvious error.

Assignment of Errors III, IV, V, VI and IX.

These assignments allege that the court erred:

> "In holding that the extent of the cession of lands on the so-called Red Lake Reservation was governed exclusively by the terms of the agreement with the Red Lake Indians, and in concluding therefrom that all lands included within the area described in said agreement as reserved, remained the exclusive property of the Red Lake Indians."
>
> "In disregarding the cession of said Red Lake Reservation effected by agreements executed by more than two-thirds of the male adults of all the Chippewa Indians of Minnesota, whereby there was expressly ceded all and so much of the Red Lake Reservation as was not actually required to make and fill the allotments to the Red Lake Indians, in quantity and character as provided in the Act of January 14, 1889."
>
> "In holding neither the Act of January 14, 1889 (25 Stat. 642) nor the General Allotment Act of February

8, 1887 were made a part of the agreements with the Indians, and that no allotments to the Indians on the Red Lake Reservation were required to be made under said agreements."

"In holding, in effect, that plaintiffs had no right, title nor interest in the lands, and timber thereon, disposed of by the Act of February 20, 1904 (33 Stat. 48-50) and hence sustained no loss thereby."

"In holding as a conclusion of law that plaintiffs were not entitled to recover and directing that plaintiffs' petition be dismissed.

The above five Assignments of Error are so inter-related that separate consideration would necessitate unnecessary repetition. To avoid this, they are hereinafter dealt with in their logical sequence.

An examination of the opinion of the Court of Claims indicates clearly that its decision is based squarely on the proposition that the agreement with the Red Lake Indians alone was to be looked to in determining whether the excess lands included within the vast area reserved for allotments at Red Lake were in fact ceded. Thus the court said (R. 98):

"The ultimate question in the case is whether the reservations made *in the agreement with the Red Lake Indians*, by virtue of the provisions of the Act, also conveyed the part reserved." (Italics ours.)

The Court further held (R. 98), that Section 1 of the Act of 1889 "clearly implied that the consent of all of the different bands was necessary to put the agreements made with the Indian bands, and each of them, in force". From this and other similar statements appearing in the opinion, we understand the court to mean that in order to effect a cession of the Red Lake Reservation it was necessary to obtain, not only the consent of two-thirds of the male adults of all the Indians, but also two-thirds of the membership of each

band, including the Red Lake Band, and that in consequence the cession was no broader than that embraced in the Red Lake agreement.

The Court further held (R. 101) that the Red Lake agreement was so far ambiguous as to permit resort to the minutes of the verbal negotiations with the Red Lake Indians alone which preceded its execution in order to determine the extent of the cession of the Red Lake Reservation effected under the Act of 1889, and that, notwithstanding the plain and explicit references in the agreements of cession to the Act of January 14, 1889, and the plain command of that Act that allotments should be made in compliance with the General Allotment Act of 1887, those Acts formed no part of the agreements, and allotments to the Red Lake Indians were not required thereunder.

Basing its conclusion upon the language of the Red Lake agreement, and the verbal negotiations which lead up to it, the court concluded (R. 103) that:

> "We think it should be held that the lands reserved in the agreement of 1889 made by the Red Lake Indians were not ceded to the government."

In consequence, the Court having found that no part of the area set aside for allotments at Red Lake was ceded under the Act of January 14, 1889, necessarily concluded that plaintiffs, the beneficiaries of the trust created under that Act, acquired no right or interest therein, and in consequence, sustained no damage when the entire area was diverted to the exclusive benefit of the Red Lake Band under the Act of February 20, 1904. For these reasons the court made its conclusion of law that plaintiffs were not entitled to recover and that the petition should be dismissed (R. 113). It is respectfully submitted that an examination of the Act of January 14, 1889 and the agreements entered into

thereunder demonstrates that the court erred in these conclusions.

The Act of January 14, 1889 (R. 55-62), contained detailed instructions with perfect limitations for everything to be done thereunder. The cessions to be made were a part of the plan clearly set forth in the Act, and were to be evidenced by written agreements. The President was vested with the sole authority to determine whether the written agreements conformed in all respects with the requirements of the Act. The agreements were made and executed by the Indians (F. 16, R. 66), and were transmitted to the President, accompanied by the minutes of the council meetings and the report of the Commission and the Secretary of the Interior thereon (Fs. 20, 21, R. 68-9). The President on March 4, 1890, with the entire record before him noted his approval on each agreement, which finally set at rest and removed from consideration by any court any question as to whether a complete cession had been made of the Indian title in accordance with every provision of the Act of January 14, 1889 (*United States* v. *The State of Minnesota*, 270 U. S. 181, at 201-3, and cases therein cited).

That the Act was expressly made a part of each agreement appears from the written instruments. The agreement with the Red Lake Band (R. 66), like each of the other nine agreements (R. 67), recited:

> "We, the undersigned, being male adult Indians over eighteen years of age • • • do hereby certify and declare that we have heard, read, interpreted, and thoroughly explained to our understanding, the act of Congress approved January 14, 1889, entitled • • •, which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof • • •."

In *United States* v. *Mille Lac Band*, 229 U. S. 498, it was claimed by the Indians that they did not understand the Act of January 14, 1889, when the agreements were made, and this Court (at pp. 507-8), said:

> "True, it is said on behalf of the Indians that they did not so understand the act; that is, did not understand that existing entries could be thus carried to patent. But of this it is enough to observe that the language of the proviso to section 6 is plain and unambiguous; that the agreement recites that the Mille Lacs 'do hereby accept and consent to and ratify the said act, and each and all of the provisions thereof;' *and that the Indians, no less than the United States are bound by the plain import of the language of the act and agreement.*" (Italics ours.)

In view of this decision, we submit that the resort by the court below to the minutes of the meetings at which the agreement with the Red Lake Indians was negotiated to determine whether those Indians assented to the Act of January 14, 1889, or the General Allotment Act of February 8, 1887, the extent of the cession, the purpose for which the lands were reserved, and the ownership of the reserved lands, instead of looking to the plain language of the Act of January 14, 1889, and the agreements, appears too plain to admit of doubt.

Section 1 of the Act of January 14, 1889 (F. 10, R. 56), directed the Commissioners to secure a cession "of all and so much of" the Red Lake Reservation "as in the judgment of said Commission *is not required to make and fill the allotments required by this and existing acts*, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated:". Section 1 further directed that the cession of the Red Lake lands "*shall be deemed sufficient if made and assented to* • • • *by two-thirds of the male adults of all the Chippewa*

Indians in Minnesota," "and the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and *shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.*" (Italics ours.)

Preliminary to obtaining the cession (Sec. 1, R. 56-7), and for the purpose of ascertaining whether the proper number of Indians assented thereto *and for the purpose of making the allotments*, the Commissioners were directed to

> "make an accurate census of each tribe or band, classifying them into male and female adults, male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact number of each class."

Section 3 (R. 57), directed that allotments of land *in conformity with the Act of February 8, 1887* should be made the Red Lake Indians on the Red Lake Reservation "*as soon as practicable*" after the completion of the census and the cessions had been obtained, approved and ratified. The words, "in conformity with the Act of February 8, 1887," had relation only to the character and quantity of, and trust title to, the allotments to be made, which were to conform in these respects to the requirements of the Act of 1887. The Act of 1887 referred to (*supra*, p. 12; F. 12, R. 63), fixed the quantity of land chiefly advantageous for agriculture to be allotted each member of each class shown by the census (*supra*, p. 20; F. 12, R. 63), and in the event any Indian entitled to an allotment failed for four years to select land, it authorized the selection of such land for, and allotment to, such Indian.

Preliminary to negotiating the agreement with the Red Lake Indians, the Commissioners, obedient to the instruc-

tions contained in said Act, took the census (F. 19, R. 68), which disclosed (*supra*, p. 20) the total number of Indians residing on the Red Lake Reservation to be 1,168, classified (H. R. Ex. Doc. 247, 51st Cong. 1st Sess., p. 9), as follows: male adults, 303, female adults, 359; male minors, 237; female minors, 247; male orphans, 15; female orphans, 7. The Commissioners therefore knew when they negotiated the agreement with the Red Lake Indians that if all the allotments to be made on the Red Lake Reservation were made of "agricultural lands" it would require approximately 73,980 acres.

During the course of the negotiations, the Commissioners had received written instructions (F. 13, R. 63-4), from the Commissioner of Indian Affairs, approved by the Secretary of the Interior, that the boundaries of the tracts reserved out of which the allotments were to be made "must be definitely determined and accurately described." They knew that the cession at Red Lake was to be made by two-thirds of all the male adult members of all the Indians, and from the census that the total number of male adults of all the bands was 2,178, of which 386—or less than one-fifth—were members of the Red Lake and Pembina Bands (F. 19, R. 68). For reasons which will hereinafter appear, the Commissioners, in an attempt to comply with both the requirements of the Act, and the instructions of the Commissioner of Indian Affairs, made a temporary withdrawal of more than six times the acreage that would be actually required to make allotments to the approximately 1,168 Indians.

The agreement negotiated with the Red Lake Band (F. 16, R. 66), is as follows:

> "We, the undersigned, being male adult Indians over eighteen years of age, of the tribes or bands of Chippewa Indians occupying and belonging to the Red

Lake Reservation, in the State of Minnesota, *do hereby certify and declare that we have heard read, interpreted and thoroughly explained to our understanding, the Act of Congress approved January 14, 1889*, entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota' (Public No. 13), *which said act is embodied in the foregoing instrument, and after such explanation and understanding, have consented and agreed to said act, and have accepted and ratified the same, and do hereby accept and consent to and ratify said act, and each and all of the provisions thereof,* and do hereby grant, cede, relinquish, and convey to the United States all our right, title and interest in and to all and so much of said Red Lake Reservation as is not embraced in the following described boundaries, to-wit:

(Then follows a description by metes and bounds of 661,118 acres, F. 20, R. 69).

"• • • *for the purposes and upon the terms stated in said Act, which said lands embraced within the foregoing boundaries have been reserved* by the Commissioners appointed under said act and as therein authorized *for the purpose of making and filling the allotments therein provided for.*" (Italics ours.)

This agreement was signed by 247 of the 303 male adult members of the Red Lake Band (F. 19, R. 68; H. R. Ex. Doc. 247, 51st Cong., 1st Sess., p. 9).

An identical agreement was made with the Pembina Band residing on the White Earth Reservation (F. 16, R. 67), which was signed by 77 of the 83 male adults of that band (F. 19, R. 68; H. R. Ex. Doc. 247, 51st Cong., 1st Sess., p. 9).

By these two agreements 661,118 acres were described as reserved by the Commissioners *"for the purpose of making and filling the allotments" to the Red Lake Indians authorized by the Act.*

The Commissioners then negotiated eight additional separate agreements (Fs. 17, 18, R. 67), with the remaining eleven bands. These eight agreements, in so far as they related to the Act and the cession of the lands at Red Lake differed from the agreements with the Red Lake and Pembina Bands in the following respects only: the agreement with the White Earth Band set forth the Act in its entirety; none contained any description of the lands reserved at Red Lake, but each contained an identical provision of cession of the lands at Red Lake as follows:

> "and we do also hereby cede and relinquish to the United States all our right, title and interest in and to all and so much of the Red Lake Reservation *as is not required and reserved under the provisions of said act*, to make and fill the allotments to the Red Lake Indians in the quantity and manner as therein provided." (Italics ours.)

These eight agreements were executed by 1,560 of the 1,792 male adult members of the eleven bands (F. 19, R. 68, H. R. Ex. Doc. 247, 51 Congress, 1st Sess., p. 9), which constituted more than two-thirds of all the male adult members of the Chippewas in Minnesota, the total number of all the male adults being 2,178.

These eight agreements, signed by more than the required number of all adult male members ceded "all and so much of the Red Lake Reservation *as is not required and reserved under the provisions of said Act, to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided.*" Thus all lands were ceded that were not both (1), *required*, and (2), *reserved*, under the provisions of said act to make the allotments. The only lands complying with both requirements, and the only lands authorized to be reserved from the cession "*under the provisions of said act*" were, so much of the lands

within the withdrawn area as were required to make the allotments. All other lands were ceded in obedience to the express directions contained in the Act.

The Commissioners, having completed the census and the agreements, on December 26, 1889 (F. 20, R. 68), transmitted the same, together with the minutes of the meetings at which the agreements were negotiated, and the report of their transactions in connection therewith, through the Commissioner of Indian Affairs, to the Secretary of the Interior. In said report the Commissioners called particular attention to the agreement with the Red Lake Indians (R. 68-9), as follows:

> "• • • but they (The Red Lake Chippewas) did not like the provision for providing (dividing) with other bands, although when it was explained to them that the country from Lake Superior to and beyond the Red River of the North, was, by the united efforts of all the Chippewas, taken by conquest from the Sioux and that had it not been for such united efforts, they could not have taken or held the Red Lake Reservation; they admitted the correctness of this statement, but thought some of their neighbors had received more than their due proportion of annuities from former sales.
>
> "• • • The Chippewas of this State did unquestionably, in early times, hold their lands in common. It was so in 1825, at the time of the treaty at Prairie du Chien, and no other idea would ever have been entertained had not the mistaken policy of purchasing a tract here and there from the bands contiguous thereto been adopted. Of the vast cessions heretofore made, there is little, and in many cases nothing, left to show any benefit derived by the Indians therefrom.
>
> • • • • • • •
>
> "The Red Lake Reservation, *which they cede to the United States, contains 3,260,000 acres.* The number of Indians occupying the same is 1,168,

"The boundaries of the diminished reservation, *from which allotments* to the Red Lake Chippewas are to be made, are as follows:

(Then follows a description of the Red Lake diminished reservation, which description departs in language and somewhat in essence from the description appearing in the Red Lake agreement.)

"*This is larger than they will eventually require, but* as there are swamps and other untillable lands therein, *it cannot be reduced until after survey and allotment shall be made.*" (Italics ours.)

The total area of the diminished Red Lake Reservation as described in the aforesaid agreements with the Red Lake and Pembina Bands was 661,118 acres.

This report is important as it shows the situation which confronted the Commissioners, and which caused them to effect the excessive withdrawal, with the right reserved to the Red Lake Indians to select their allotments out of the lands within the defined area, after which the reserved area was to be "reduced," and, i. e., the remaining unallotted lands within the defined area released from the withdrawal. This was a compliance with the directions contained in the Act—to reserve only such lands as in their judgment was necessary to make the allotments—which the Commissioners were not at liberty to disregard, and also complied with the instructions of the Commissioner of Indian Affairs "to definitely determine and accurately describe the boundaries" of the reserved lands from which the allotments were to be made.

On January 30, 1890 (F. 21, R. 69), the Secretary of Interior transmitted the entire record (H. R. Ex. Doc. 247, 51st Cong., 1st Sess.), together with his report thereon, to the

President. In his report (R. 69), the Secretary advised the President, in part, as follows:

> "• • • The Red Lake Reservations, two-thirds of which at least is ceded to the United States, contains 3,200,000 acres, and the number of Indians occupying it is 1,168. The boundaries of the diminished reservation, from which allotments to the Red Lake Chippewas are to be made, are given in the report. The commissioners report that—
>
> " 'This reservation is larger than will eventually be required, but as there is swamps and other untillable lands therein, it cannot be reduced until after survey and allotments shall be made.'
>
> "Whether the surplus lands that may remain after allotments shall have been completed as required by the law, can be disposed of without further legislation is a question which will require consideration, but such consideration is not necessary at this time."

In this report the excessive withdrawal is admitted, and its ultimate reduction by disposal of the surplus lands, presumably under the Act of 1889 is discussed, and the only doubt expressed is whether additional legislation might be necessary to dispose of the surplus lands.

On March 4, 1890, the President affixed his approval to each of the ten agreements (F. 22, R. 70), and in a message to Congress of even date (R. 71), he stated, in part, as follows:

> "Being satisfied from an examination of the papers submitted that the cession and relinquishment by said Chippewa Indians of their title and interest in the lands specified and described in the agreement with the different bands or tribes of Chippewa Indians in the State of Minnesota was obtained in the manner prescribed in the first section of said Act, and that more than the requisite number have signed said agreement,

I have, as provided by said Act, approved the said instruments in writing constituting the agreement entered into by the commissioners with said Indians."

It is respectfully submitted that the net result of all of the transactions above stated was the cession to the United States of the entire Red Lake Reservation in trust for all the Chippewa Indians of Minnesota, except such lands within the area reserved by the commissioners for allotments, as would have been required to make and fill the allotments to the Red Lake Indians as in said Act provided. The contrary conclusion arrived at by the Court of Claims, to the effect that the entire 661,000 acres reserved for allotments at Red Lake remained the exclusive property of 1,168 Indians, does violence to the obvious purpose of Congress as expressed in the Act of January 14, 1889, and, as evidenced by the reports of its committees; ignores the plain language of the agreements of cession negotiated with the Indians other than those at Red Lake (which excepted from the cession only lands which were both (1) *reserved*, and (2) *required* to make and fill the allotments); and ignores the plain language of the Red Lake agreement itself, insofar as that agreement recited that the excepted lands had been reserved, not for the exclusive benefit of the Red Lake Indians, but *solely for the purpose of effecting the allotments provided for in the Act.*

As has been stated, under the express provisions of Section 1 of the Act, the Commissioners were instructed to negotiate for the cession of all Chippewa lands in Minnesota except so much of the White Earth and Red Lake reservations "as in the judgment of the Commission is not required to make and fill the allotments required by this and existing acts". Congress could not have more clearly stated its intention that all Indian lands except those actually utilized for allotments should be ceded by the agree-

ments and that *all tribal ownership in common should be terminated.* The directions contained in the act are so free from ambiguity that there is no room for construction—*U. S.* v. *Missouri Pacific P. R. Co.*, 278 U. S. 269, Syl. 2. If, however, it should be contended that there is any ambiguity in the language of the Act itself in this regard, reference may be had to the report of the Committee of the House of Representatives reporting the bill which became the Act of January 14, 1889. In that report, the committee considered certain prior tentative agreements under which an area of approximately 800,000 acres would have been left in the exclusive common ownership of the Red Lake Band. As a reason for not approving these agreements the committee said (R. 53-4):

> "The Red Lake agreement is also open to serious objection in perpetuating forever the tribal evolution of those 1,100 Red Lake Indians, by giving them in perpetuity a tribal fee title to a cool million acres of agricultural lands, less the individual allotments, which could not well exceed 160,000 acres of land. This seems the height of prodigality, to first give each of these Indians a farm and then give the whole band—only 1,100 of them—over 800,000 acres in common in fee forever.
>
> "It is now conceded on all hands that the only safe and practical way to civilize the Indians is by alloting lands in severalty to them—*breaking up their tribal relations and ownership in common,* and putting them to work as individuals on their several allotments. Not only does the Red Lake agreement do violence to these views, *but it seems particularly calculated to build up an Indian land monopoly and oligarchy,* more than that which now exists among some of the so-called civilized tribes in Indian Territory."

The Committee further said (R. 55):

> "In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full

citizens, *to allot ample land to each of them in severalty, to dispose of the residue of the lands*—the pine lands for the highest possible figure, the agricultural lands at $1 per acre to actual settlers under the homestead laws—and to give all the Indians the entire benefit of the proceeds of the lands, less the necessary expense attending their survey, appraisal and disposal." (Italics ours.)

It will be noted that the construction placed upon this bill, and the agreements, by the defendant, and sustained by the court below, created exactly the "Indian land monopoly and oligarchy" in the Red Lake Band which Congress found objectionable in the former agreements, the only difference being that the area here involved is 660,000 acres instead of 800,000 acres under the former plan.

The report of the Commissioners above quoted shows that they knew that the area reserved at Red Lake was greater than would be required for allotments, and would have to be ultimately reduced. If the agreements as a whole are interpreted as effecting a permanent and complete exception of this area from the cession, the acts of the Commissioners in effecting such a reservation were, of course, a plain violation of the mandate of Section 1 of the Act that they negotiate for a cession of all and so much of the lands as in their judgment "is not required to make and fill the allotments required by this and existing acts."

However, the Commissioners obviously intended no such permanent reservation, and attempted to comply to the best of their ability both with the requirement of the act that only such lands be reserved as should be required to fill the allotments, and with the instructions from the Secretary of the Interior that the allotment areas be specifically defined.

Being unable to find any compact body of land on the Red Lake Reservation containing only land suitable for al-

lotments and embracing only the approximate acreage which would have been consumed in making allotments to the Red Lake Indians, they were faced with a situation where a literal compliance both with the instruction contained in Section 1 of the Act (to reserve only enough land to fill the allotments), and with the instructions of the Secretary (to definitely set forth the boundaries of the reserved area), would work inevitable injustice to the Indians to be allotted.

Confronted with this situation, the Commission adopted an ingenious expedient, but in so doing sowed the seeds of 40 years of controversy which has culminated in this suit.

By the terms of the agreement signed by the Red Lake and Pembina Indians, the Commissioners withdrew, and excepted from the cession by these bands, a tract, described by metes and bounds, containing 661,118 acres of land (substantially more than six times the maximum amount which the Commissioners knew would be required for allotments), but at the same time embodied in the agreement an acceptance of the act of 1889 and all its provisions, and carefully indicated the limited purpose, and consequent temporary nature, of the exception and withdrawal, by expressly reciting, in said instrument (R. 66), that said lands were:

> "Reserved by the Commissioners appointed under said act as therein authorized for the purpose of making and filling the allotments therein provided for."

Having in mind the provisions of the act of January 14, 1889, to the effect that, as to the Red Lake Reservation, "the cessions and relinquishments shall be deemed sufficient if made and assented to by two-thirds of the male adults of all the Chippewa Indians in Minnesota" (R. 56), the Commissioners proceeded, in the eight agreements signed by the male adults of the other eleven bands, to make certain that there was in fact a cession of all lands

on the Red Lake Reservation not ultimately actually required for allotment. This they accomplished by including in each such subsequent agreement a cession by each signatory band of:

> "So much of the Red Lake Reservation as is not *required and reserved* under the provisions of said act to make and fill the allotments to the Red Lake Indians in quantity and manner as therein provided" (R. 68).'

It is to be noted that by this language all lands included in the Red Lake Reservation are ceded which are not *both* (1), required to fill the allotments provided for, and (2), reserved under the provisions of said act for that purpose. The only lands complying with both requirements, and the only lands which were authorized to be reserved "under the provisions of this act", were so much of the land within the withdrawn area as was required to complete the allotments. All other lands at Red Lake were expressly ceded by these eight agreements.

Since these agreements with the Indians, other than those of the Red Lake and Pembina bands, were actually signed by 1,560 out of a total of 2,178 male adult Chippewas in Minnesota (R. 68), *i.e.*, by more than two-thirds of the total, these eight agreements, standing alone, complied fully with the requirement of Section 1 of the Act of 1889, and effected a sufficient and complete cession of all of the Red Lake lands not actually required to make and fill the allotments to the Red Lake Indians. This result is attained without depending at all upon the assent of the signers of the Red Lake or Pembina agreements (although all male adults of those bands are included in the total of 2,178).

The fact that the Red Lake and Pembina Indians also executed agreements of cession which are claimed by defendant to be more limited in their effect, does not qualify or restrict in any manner the cession effected by the other

Indians. So far as appears, the terms of the Red Lake and Pembina agreements, and the vast reservation of 661,118 acres therein defined, were never assented to by any Indians other than the 324 members of Red Lake and Pembina Bands who signed the same.

By attaching paramount importance to the terms of the Red Lake and Pembina agreements and disregarding almost completely the agreements with the other bands which in fact effected the cession at Red Lake, the Court below committed at the outset fundamental error as to the major issue which led inevitably to a wrong result. The ultimate question for determination is not the extent of the cession effected by the Red Lake and Pembina agreements, whereby a defined area six times as large as required, was described as "reserved by the Commissioners appointed under said Act, for the purpose of making and filling the allotments therein provided for." The question is the extent of the cession of Red Lake lands effected by the eight agreements with the other eleven bands, all of which expressly and clearly ceded "so much of the Red Lake Reservation as is not *required* and reserved under the provisions of said Act to make and fill the allotments to the Red Lake Indians therein provided for."

By this language it was, of course, intended to except from the cession enough land to complete the allotments to which the Red Lake Indians were entitled under the provisions of the Act of 1889, but the use of the word "required" definitely restricted the lands so excepted to those *necessary to fill these allotments.* The words "and reserved" further restricted the lands excepted from the cession, to lands thus actually required for allotments *and also situated within the reserved area.* The obvious purpose of this further restriction of the lands excepted from cession was to make it clear that lands outside the reserved areas were not available for allotments, and hence could be im-

mediately sold and disposed of under the Act. While the surplus ceded lands within the reserved area could not be identified until the allotments were made, and hence were not available for disposal until this had been done, the Act of 1889 expressly provided that the allotments should be made "as soon as practicable," and this offered no great difficulty.

We submit that this is the only interpretation of the agreements executed by the bands (other than Red Lake and Pembina), and under which the Red Lake Reservation was ceded, which is consistent with the express language of those agreements, and the only interpretation consistent with the obvious purpose and intent of the Act of January 14, 1889 (which was expressly accepted and approved by, and made an integral part of, all the agreements), to *break up all tribal common ownership.*

In a number of cases the Act of January 14, 1889, and the agreements entered into thereunder have come before this Court for consideration. In several of these cases this Court carefully reviewed the provisions of the Act and the agreements, and in every instance recognized that the plain meaning and intent of the Act and agreements was to effect a cession of the entire Chippewa title to *all lands not actually required for allotment.*

In *Minnesota* v. *Hitchcock*, 185 U. S. 373, after a careful and painstaking review of the history of Chippewa titles, and a detailed analysis of said act and agreements, said:

> "The cession was not to the United States absolutely, but in trust. *It was a cession of all* the unallotted lands. * * *"
>
> "Now it is contended that this legislation, *though dealing with, in terms, all the unallotted lands,* is subordinated to the prior promise of the government to grant sections 16 and 36 to the state for school purposes.

> "*The cession was, as we have seen, of all the unallotted lands,* and the cession was of those lands 'for the purposes and upon the terms hereinafter stated.' It was a distinct conveyance by the Indians of certain lands for a named purpose. Now if the United States, the recipient of this cession, was competent to carry into execution the expressed purposes, *does it not follow that the cession subjected all the lands to them?*"

In *United States* v. *Mille Lqc Band*, 229 U. S. 498, after discussing the prior treaties and negotiations with the Chippewas, the Court again carefully considered the effect of the Act of January 14, 1889, and reaffirmed the conclusion reached in *Minnesota* v. *Hitchcock* that all lands not required to fill the allotments were ceded by the 1889 agreements. The court said (italics ours):

> "That legislation came in the Act of 1889. It provided for a commission to negotiate with all the bands of Chippewas in Minnesota for the cession and relinquishment of all their reservations, excepting the White Earth and Red Lake Reservations, *and for the cession and relinquishment of so much of them as should not be required for allotments.* It further provided that the cession and relinquishment should be obtained as to each reservation, other than the Red Lake, through the assent in writing of two-thirds of the male adults of the band 'occupying and belonging to' it, and, as to the Red Lake Reservation, through a like assent of two-thirds of the male adults of all the Chippewas in the State; that the cession and relinquishment as to each reservation should be subject to the approval of the President, and when approved should operate *as a complete extinguishment of the Indian title* 'for the purposes and upon the terms' stated in the Act."

At page 508 (229 U. S.) this Court said with reference to the binding force and effect of the Act and the agreements:

> "• • • the Indians, no less than the United States, are bound by the plain import of the language of the act and the agreements."

The prior interpretation by this Court of the act and agreements, became an integral part of the Act and agreements, and was binding on the court below—*Gulf C. & S. F. R. Co.* v. *Moser*, 275 U. S. 133, Syl. 2. The lower court, however, considered and treated the interpretation of said Act and agreements by this Court as *obiter dicta* (Op. R. 109-10).

It therefore appears plain that all lands on the Red Lake Reservation, except enough to make and fill the allotments to the Red Lake Indians in the quantity, of the character, and at the time, specified in the Act, were ceded by the agreements. That all ceded lands were to be sold and disposed of, as in the Act provided, and the proceeds deposited in the trust fund to the credit of plaintiffs, is too plain to admit of doubt. The ruling of the Court below that the land in suit was not ceded by the Act and the agreements, but was and remained the exclusive property of the Red Lake Indians, is too obviously erroneous to require further discussion.

Later Withdrawal of Lands Outside Original Withdrawn Area.

In addition to the 661,118 acres included within the boundaries of the temporary withdrawal, as described in the agreement with the Red Lake Indians (F. 20, R. 69), defendant's President, on the recommendation of the former Chairman of the Chippewa Commission, by executive order dated November 21, 1892, withdrew 2,303 acres of the lands expressly ceded by the Act of 1889 and the agreements (F. 24, R. 72-3), and added them to the withdrawal on the Red Lake Reservation, the authority for which nowhere appears, and the validity of which is expressly challenged (Pet., par. 5, R. 14). The reason assigned for this withdrawal is that they were mistakenly omitted by the Com-

mission from the original temporary withdrawal. Whether they were omitted by mistake or otherwise, there was no statutory or other authority for correction through an executive order, as these lands had theretofore been expressly ceded. As to these 2,303 acres dealt with by the Act of February 20, 1904, there can be no question as to plaintiff's rights therein.

Wrongful Taking under Act of February 20, 1904

Fourteen years after the agreements became absolute (F. 22, R. 70-1), and in disregard of the express instructions contained therein (F. 10, R. 57, Sec. 3; Fs. 16-18, R. 66-7; *La Roque* v. *United States*, 239 U. S. 62, 65-6), no allotments had been made on the Red Lake Reservation (F. 25, R. 73). By Act approved February 20, 1904 (F. 29, R. 76, 80-1), Congress directed the sale of that part of said temporarily withdrawn lands on the Red Lake Reservation lying westwardly of the range line between ranges 38 and 39 west of the fifth principal meridian, comprising 256,152 acres, and the payment of the net proceeds received therefrom in annual per capita payments *solely to the Indians belonging on the Red Lake Reservation.* The Act further provided that the Indians on the Red Lake Reservation should possess their diminished reservation *independently of all other bands of the Chippewa Tribe of Indians*, and that nothing contained in said Act *should be so construed as to deprive the Indians on the Red Lake Reservation of any benefits to which they were entitled under existing treaties* or agreements not inconsistent with the provisions of said Act.

The Act of February 20, 1904, dealt with not only the 661,118 acres included within the boundaries of the original temporary withdrawal as described in the agreement with the Red Lake Indians, but also with the 2,303 acres of ceded

lands added to the temporary withdrawal by the executi order.

The Court below held that all the lands dealt with by the Act of February 20, 1904, were, at the date of said Act and at all times prior thereto, the exclusive property of the Red Lake Band and that defendant so treated and dealt with them (Op. R. 104); and, therefore, there was no taking by the Act of February 20, 1904, of any property in which appellants had any interest, and accordingly they had sustained no loss.

This last conclusion of the Court below is based upon its prior conclusions (1), that at and prior to January 14, 1889, the Red Lake Indians were the exclusive owners of the lands in suit; and (2), that there was no cession by the Act of 1889 and the agreements of any of the lands in suit, which continued to remain the exclusive property of the Red Lake Indians, the error of each of which we have hereinbefore pointed out (*supra*, pp. 39-59), and need not be here again repeated.

The Court below further held (Op. R. 106), that defendant, in the Act of February 20, 1904, dealt with the Red Lake Indians as the exclusive owners of the land in suit, basing this conclusion upon the minutes of the negotiations which resulted in an inchoate agreement (R. 106-7), isolated extracts from said minutes having been included in the record (F. 27, R. 75), over objection of appellants.

The Act of February 20, 1904, had its inception (F. 27, R. 74) in a letter dated January 30, 1902, addressed to the Secretary of the Interior from the mayor of Thief River Falls requesting that the western portion of the lands in suit be opened to entry under the homestead laws of the United States, and the proceeds received therefrom paid to the Red Lake Indians. An Act approved March 3, 1901 (R. 75), authorized the Secretary of the Interior to nego-

tiate agreements "*with any Indians* for the cession to the United States of portions of *their respective reservations or surplus* unallotted lands." As hereinbefore pointed out, all the lands within the withdrawal at Red Lake, except enough to make and fill the allotments to the Red Lake Indians, had been ceded to the United States, impressed with the trust set forth in the Act of 1889 and the agreements, but the then Secretary of the Interior, evidently without proper inquiry into the situation, on February 10, 1902, despatched an Indian inspector to Minnesota to negotiate an agreement with the Red Lake Band for the cession of the lands as requested in the letter of the mayor of Thief River Falls (R. 75). The negotiations that followed resulted in an inchoate agreement (R. 75), but which was never ratified (F. 28, R. 76). The inchoate agreement, in amended form, was included in the Act of March 3, 1903, with a provision that it should not become effective unless ratified by a majority of the male adults of the Red Lake and Pembina Bands (R. 76). The Indians never ratified the agreement. Thereupon Congress passed the Act of February 20, 1904.

The Act of February 20, 1904 (F. 29, R. 76, 81-2), clearly recognized that the lands therein dealt with had been disposed of by the Act of January 14, 1889, and the agreements, as will appear from the following provisions of the Act (R. 81):

> "It is further agreed that the said Indians belonging on the said Red Lake Indian Reservation, Minnesota, *shall possess their diminished reservation independent of all other bands of the Chippewa tribe of Indians* * * *."
>
> "*It is understood that nothing in this agreement shall be construed to deprive the said Indians belonging on the Red Lake Indian Reservation, Minnesota,*

of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this agreement." (Italics ours.)

The first provision (above quoted) was a recognition of the outstanding rights or claims in all the other bands of Chippewa Indians to the lands within the "diminished reservation"—the title to which defendant then held as Trustee, impressed with the trust created by the Act of 1889 and the agreements—and a declaration that thereafter the Red Lake Indians alone should be possessed of said lands, "independent of all other bands of the Chippewa Tribe of Indians"; with a further declaration (second provision above quoted) that the conferring of the exclusive title upon the Red Lake Band should not operate to deprive them of any "benefits to which they were entitled" under the Act of 1889 and the agreements. It thus appears plain that the Act of February 20, 1904, on its face recognized an outstanding claim to the lands therein disposed of in all the Chippewa Indians of Minnesota.

The court below (Op. R. 108) rejected this contention of appellants, saying:

> "Counsel for defendant insist that article IV constituted a recognition of the outstanding claim. On the contrary, when we consider the situation and the negotiations which led to the agreement, it becomes very plain why this provision was inserted in the agreement. The Red Lake Indians had heretofore ceded a very large body of land to the Government and it was explicitly understood at the time the cession was made that the diminished reservation should be theirs alone. Now they were called upon to make an additional cession, and what was said at the time of the negotiations shows that the Indians wanted this to be final and the last time they should be called upon to make any cessions."

Here again the Court adhered to its previous error, hereinbefore pointed out, with reference to the title to the reserved lands at Red Lake under the Act of 1889 and the agreements; and further erred in failing to take into consideration all that was said in the negotiations leading up to the inchoate agreement, and selecting therefrom only a few isolated sentences. If resort could properly have been made to the minutes of the negotiations, the entire minutes should have been considered. They appear in House Ex. Doc. No. 532, 57th Congress, 1st Session, and of which this Court is requested to take judicial notice, notwithstanding the refusal of the court below to either omit from its findings any reference thereto, or to include in its findings certain portions of said minutes hereinafter set out. The proposition submitted by the Inspector to the Red Lake Indians during the course of the negotiations is stated in the House Document at pp. 13-16, as follows:

> "The cession of the western portion of your reservation is an independent proposition and entirely different from what your last agreement was. This is something in which you people of Red Lake Agency alone have any interest; that is, *provided you take advantage of my presence here and my readiness to meet you on common grounds and a fair proposition, and you don't want to keep your ear closed so as not to hear what I am going to say.* You have an opportunity now to protect yourselves in a way that there are no other Indians in the country that can be better protected. *Your agreement of 1889 does not protect you as a tribe and as an agency fully. There has been a certain tract of land described, and certain boundary lines within which you may take allotments, and under that agreement,* which this book contains (indicating), *the Government could at any time order allotments made to you, and all the surplus lands would be declared open for settlement under the same conditions that your other ceded lands are;* that is, the pine-land portions that were ap-

praised and sold for less than their appraised value, and the agricultural land opened to settlement under the homestead acts at $1.25 per acre.

"*I am in a position at this time,* having been sent here by the Secretary of the Interior, *to negotiate with you, to make a bargain that will protect you and establish your undisputed right to the possession of this reservation,* and no other Indians would have rights to the proceeds of this reservation but yourselves, *while under the Act of 1889 the surplus lands of this reservation, not required for allotments for yourselves and your families may be thrown open to settlement, in which case every Chippewa Indian of Minnesota would have a share of the proceeds arising therefrom.* In case we conclude the agreement that we are talking about for this tract of land of 256,152 acres, all of the proceeds of that tract goes entirely to the Indians of the Red Lake Agency. It would be so provided in the agreement. Another clause will provide that the remaining portion, after that is ceded, will belong to the Indians of the Red Lake Agency alone. You can see the way your lands have gone and the proceeds of the lands you have ceded. There are too many persons of different agencies interested in it. Your present condition is unsatisfactory and tenure uncertain." (Italics ours.)

Thus if the minutes of the negotiations leading up to the inchoate agreement could properly be considered in interpreting the Act, the court below failed to include in its findings the material portions of the minutes, which abundantly sustained appellants' contention with reference to the intent and purpose of the Act of February 20, 1904.

The Court further says (Op., R. 108):

"In the same manner Congress recognized the sole right of the Red Lake Indians to their reservation by passing a number of acts relating to this reservation and the proceeds of the sale of lands therefrom subsequent to the act of 1889."

For the particular Acts the court below merely refers to its finding 34 (R. 83-5). An examination of that finding fails to provide any basis for the above statement. Only one of the Acts—Act of April 14, 1896—was passed subsequent to January 14, 1889, and prior to February 20, 1904. The obvious reason for the inclusion in that Act (R. 83) of the provision, viz: "that • • • this Act shall not apply to the Red Lake Reservation until the consent of the Red Lake Indians shall be obtained thereto," was that Congress did not intend to permit a grant of a railroad right-of-way though the lands reserved for the selection of allotments without the consent of the Indians who were to take their allotments therefrom. There is no claim that the compensation for the right-of-way was to be paid to the Red Lake Indians. The provision in the Act of March 3, 1903, cited, never took effect, and culminated in the Act of February 20, 1904, as hereinbefore pointed out.

All the other acts cited in finding 34 were passed subsequent to February 20, 1904, and after the disposal and taking complained of had been fully effected. Clearly they formed no basis for a construction of the title to the lands in suit under the Act of 1889 and the agreements at or prior to the Act of February 20, 1904. The inclusion of this finding in the record was objected to in the court below and assigned as error here, Assignment of Error VII.

It is apparently conceded by the court below that if the Act of 1889 and the agreements ceded all lands within the temporary withdrawal not required to make and fill the allotments to the Red Lake Indians, as appellants contend, the Act of February 20, 1904, effectually took and disposed of appellants' interests in the surplus lands, for which they were entitled to recover. As to the 2,303 acres covered by the Executive Order, there can be no question that they were ceded by the Act of 1889 and the agreements, and it appears equally clear that all the other lands, except enough

to make the allotments to the Red Lake Indians were likewise ceded.

This Court, in a situation strikingly similar (*U. S.* v. *Mille Lac Band*, 229 U. S. 498 at 509-10), said:

> "As before stated, the lands not within the proviso were disposed of, not under the Act of 1889, but under the general land laws; not for the benefit of the Indians, but in disregard of their rights. That was clearly in violation of the trust before described, and the Indians are entitled to recover for the resulting loss. *In principle it is as if the lands had been disposed of conformably to the Act of 1889, and the net proceeds placed in the trust fund created by Sec. 7, and the Government then had used the money, not for the benefit of the Indians, but for some wholly different purpose. That the wrongful disposal was in obedience to directions given in two resolutions of Congress does not make it any the less a violation of the trust.* The resolutions, unlike the legislation sustained in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 307, 47 L. Ed. 183, 190, 23 Sup. Ct. Rep. 115, and *Lone Wolf* v. *Hitchcock*, 187 U. S. 552, 564, 568, 47 L. Ed. 299, 305, 307, 23 Sup. Ct. Rep. 216, were not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards, but were intended to assert, and did assert, an unqualified power of disposal over the lands as the absolute property of the Government. Doubtless this was because there was a misapprehension of the true relation of the Government to the lands, but that does not alter the result." (Italics ours.)

See also *United States* v. *Creek Nation*, 295 U. S. 103 at 109-10.

The Damages Recoverable.

The Court further found as a fact (F. 31, R. 82) that defendant received from the disposal of 256,152 acres of land in suit, the sum of $1,268,136.84, "which amount was the

reasonable and actual value of said lands on the effective date of said Act of February 20, 1904''; that at said date the reasonable market and actual value of the remaining 404,966 acres, exclusive of timber, was $542,128.00, and the reasonable and actual value of the timber standing thereon was $1,412,095.00, making a total value of all the lands and timber taken by the Act of February 20, 1904 as of the date of said Act of $3,223,289.84. Part of the timber referred to has been sold and the proceeds, $1,404,025.14, devoted solely to the use of the Red Lake Band (F. 36, R. 86).

The Court further found as a fact (F. 30, R. 82) that ever since the date of the Act of February 20, 1904, defendant has held and continues to hold said lands and the moneys derived therefrom for the sole and exclusive benefit of the Indians belonging on the Red Lake Reservation to the exclusion of all other Chippewas in Minnesota.

There was mooted in the Court below, but not determined by that Court, the question of whether the defendant is entitled to credit, against the value of the property thus wrongfully diverted from the trust, of the value of so much of the lands involved as would have been used in making the allotments which should have been made to the Red Lake Indians under the plain terms of the Act of January 14, 1889, and the agreements. It is the position of the appellants that, since defendant failed to perform its duties as trustee by effecting the allotments ''as soon as practicable'' as required by the Act, and thereafter wholly diverted said lands from the trust in question, thus disabling itself from ever effecting the allotments, it cannot now claim any credit on account of the allotments which it should have, but did not, and now cannot, make.

Having found that appellants were not entitled to any recovery whatever, the court below was not required to, and did not, pass upon this question. If this Court, upon reversal of the judgment below, shall be of the opinion that

defendant is entitled to any such offset or credit, the amount thereof will be for original determination by the lower court under the mandate of this court, and the amount will be readily susceptible of calculation by the court below.

Notwithstanding the fact that that Court did not assume to pass upon this issue, the general character of the evidence which would be the basis of such a calculation may be observed from Findings 31 and 32 (R. 82-3), which show the uniform agricultural character and value of the 256,152 acres sold under the Act of February 20, 1904, and the character, acreage and various values per acre of each of the several kinds of land which constituted the entire balance of the reservation. There was also in the record evidence as to the location and amount and value of the timber on each of the forty-acre tracts of the timbered lands. The character of the land subject to allotment, the quantity of land to be allotted to each Indian were specified by the General Allotment Act of 1887 (24 Stat. 388), which, under Section 3 of the Act of January 14, 1889, governed the allotments in question.

The Court also had before it evidence as to the number of Indians eligible for allotments on the Red Lake Reservation at various dates (F. 33, R. 83), the court finding that the number on March 4, 1890, the date when the agreements became effective, was 1,168; that on February 20, 1904, when the reservation was diverted, the number was 1,418, and that by steady increases from 1890 to 1932 the total number of the Red Lake Indians increased to 1,736 in 1927 and 1,881 in 1932.

In any event, the maximum possible credit on this account would not affect plaintiffs' right to the major portion of their damages. Figured at eighty acres to each Indian, the approximate total area which might have been allotted had the allotments been made promptly after March 4, 1890, to the 1,168 Indians eligible for allotments at that

time, would have been 93,440 acres. The Court below found (F. 31, R. 82) that the 256,152 acres sold under the Act of February 20, 1904, "were substantially uniform in character, bore no timber of value, were generally level, including both tillable lands and marshy meadow acres, and were more suitable for agricultural purposes than the remaining portions of the Red Lake Reservation." Under the General Allotment Act "lands advantageous for agricultural and grazing purposes" were to be allotted. This excluded substantially all the balance of the reservation which was not suitable for either purpose (F. 32, R. 82). The fair value of the lands in the area sold and the price procured therefrom was slightly more than $4.95 per acre, and if it be assumed that all of the allotments would have been made out of this best agricultural area, the maximum credit to which defendant would have been entitled would not exceed the value of the 93,440 acres required for allotment at $4.95 per acre. It is further apparent from Findings 31 and 32 that upon no theory could the value of the lands allottable to the Red Lake Indians constitute more than a relatively small part of the total value of the lands here involved. As stated above, the area reserved was six times that required to effect the allotments.

Assignment of Error VIII.

> "The Court erred in including in its Special Findings of Fact, Findings numbered 37, 38, 39, 40 and 41, relating to claimed offsets by defendant."

Following the filing by the Court below of its Special Findings of Fact, counsel for appellants moved the Court to amend its Findings 37, 38, 39, 40 and 41, which merely set out grand totals, by including therein tabulations of the specific items making up the grand totals, pointing out that by the omission of the specific items the Court below

would deprive appellants of any opportunity to assert any of their objections to any such items on review by this Court. The items requested to be included in the findings had been included in the Commissioner's findings, and many of the items making up the grand totals disclosed on their face that they were either expenditures the United States was obligated to make under treaties, or did not constitute moneys "paid to or expended for" the Chippewa Indians of Minnesota subsequent to January 14, 1889, and were not allowable as set-offs under Section 3 of the Jurisdictional Act (R. 2). The Court below denied the motion, and in a memorandum opinion (R. 34-5), offered the following explanation for the inclusion of said five findings in its Special Findings of Fact:

> "Plaintiffs also complain because the findings do not set out an itemized account which shows the nature of the expenditures referred to in findings 37, and 38. By oversight the total of the amount of expenditures specified in finding 37 was made $74,991.99 too large and this finding will be corrected accordingly. *The court, however, did not decide that any item or items of expenditure made by the Government were proper offsets under the bill which gave this Court jurisdiction of the case. At the present stage of the proceedings there is no occasion to list these items separately in the findings.*" (Italics ours.)

While the Court below says that it did not decide that any item or items of expenditure made by the Government were proper offsets, it made definite findings that the grand totals set out in each were expended by the "*United States although under no obligation so to do, out of the Public Funds for the Chippewa Indians of Minnesota under other than treaty appropriations,*" and refused to include therein tabulations of the specific items making up the grand totals, thus depriving appellants of any opportunity to assert any

of their objections to the grand totals in this Court. Having decided to dismiss appellants' petition, there was no occasion for considering the items of set-off urged by defendant, and the findings complained of were made without consideration of the various items making up the grand totals, and their inclusion in the Special Findings of Fact was improper.

The fact that no consideration was given to the question of what portion of the items included in Findings 37 to 41, inclusive, were proper offsets within the meaning of the Jurisdictional Act, further appears from the second sentence of the decision of the Court of Claims (R. 88). There the court says:

> "Both the defendant and the intervener, the Red Lake Band of Chippewa Indians, contravene the allegations of the petition, *and the defendant sets up some other defenses which, in our view of the case, it is not necessary to consider.*"

In view of the fact that the only pleading interposed by the defendant was a general traverse, and the only other defensive matter appearing in the record consists of the offsets in question, we assume that this has reference to the offsets which of course became immaterial in view of the court's rejection of appellants' main claim.

From the quotations above set forth, it is abundantly apparent that the lower Court has never assumed to pass upon the total of the offsets to which defendant may be entitled, and if this court shall be of the opinion that plaintiffs are entitled to recover, the question of the amount of such offsets, like the question of the amount of any credit to which defendant may be entitled on account of the value of the lands which should have been allotted, will be for original determination by the Court of Claims under the mandate of this court. It is to be noted that the maximum

amount of all such credits and offsets would still leave a substantial recovery to the plaintiffs who, if they are entitled to recover at all, are entitled, under the provisions of the Jurisdictional Act, to the value of the misappropriated property, plus interest at the rate of five per cent per annum for the thirty-two years which have passed since the unlawful taking.

CONCLUSION.

Plaintiffs in this case, under the terms of the Jurisdictional Act, constitute the beneficiaries of the common trust for all the Minnesota Chippewas, created under the Act of January 14, 1889, and it is expressly provided in that Act that they shall be deemed to include not only those entitled to receive the trust income during the period of the trust, but also all those entitled to share in the final distribution of the trust property at the end of the fifty year trust period. Both legal and equitable rights are directed to be adjudicated.

This case is one in which the plaintiffs, including all of the beneficaries of a perfectly defined trust, seek to require the trustee to restore to the trust funds the fair value of property claimed to have been taken by the trustee from the corpus of the trust, and turned over to a separate and distinct class, the Red Lake Indians, constituting only a small part of the beneficiaries of the trust. By the express terms of the agreement by which the property was thus wrongfully turned over, the members of this separate and specially favored class still retain their complete, original interests in the trust as a whole, and the diversion was thus effected without any compensating benefits whatever to the other beneficiaries of the common trust.

That any court having equitable jurisdiction over the trust would require the trustee to account for the value of

trust property thus disposed of in violation of the trust is, of course, not subject to serious dispute. The denial of relief by the Court below was based not upon any failure to recognize the right of plaintiffs to relief under such circumstances, but upon the erroneous finding by the court below that the property in question was in fact not ceded under the Act of January 14, 1889, and therefore never became part of the corpus of the trust at all. As we have endeavored to make plain in the foregoing portions of this brief, the Court of Claims erred in this conclusion.

Having found that plaintiffs had no right to the lands in question, the Court of Claims, although it determined the then total value of the lands appropriated to the sole benefit of the Red Lake Indians under the Act of February 20, 1904, to have been the sum of $3,223,289.84, neglected to pass upon the validity or amount of any credit against this amount to which the defendant might be entitled on account of the lands which should have been used for allotments to the Red Lake Indians, and likewise failed to pass upon the validity of the gratuity offsets asserted by the defendant, although it appears from the findings made that the maximum total of all these claims is substantially less than the total damages to which plaintiffs are entitled.

It is respectfully submitted that the judgment herein should be reversed, and the case remitted to the Court of Claims with instructions to enter judgment for plaintiffs. The basis of that judgment should be the value of the lands reserved for allotment on the Red Lake Reservation as the same existed on February 20, 1904, which was the date of the wrongful appropriation or disposal thereof. If this Court shall be of the opinion that defendant is entitled to any credit or deduction from this amount on account of the value of the lands which should have been used for allotments to the Red Lake Indians, the lower

court should be instructed to determine said amount, deduct the same from the value of the reservation as it stood on the date of its wrongful disposal, and add to the balance interest at five per cent per annum from February 20, 1904, as directed in the Jurisdictional Act. From the amount thus computed, there will, of course, be deducted the amount of such of the offsets asserted by the defendant as the Court of Claims may find to constitute "gratuities paid to and expended for said Indians" within the meaning of the Jurisdictional Act.

Respectfully submitted,

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(8335-C)